RECORD, CASE N

SUPREME COURT OF THE UNITED

OCTOBER TERM,

TERM No.,

GEORGE D. HAVEN, PLAINTIFF IN

vs.

ARCHIBALD BORLAND.

IN ERROR TO THE CIRCUIT COURT OF THE
THE NORTHERN DISTRICT OF

FILED JUNE

RECORD, CASE No. 14,061.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 364.

GEORGE D. HAVEN, PLAINTIFF IN ERROR,

vs.

ARCHIBALD BORLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 *Complaint.*

In the Superior Court, City & County of San Francisco, State of California.

ARCHIBALD BORLAND
vs.
GEORGE D. HAVEN and D. C. NICHOLS.

Now comes the plaintiff, Archibald Borland, by Hosmer P. McKoon, his attorney, and complains of George D. Haven and D. C. Nichols, the defendants, and alleges—

That at all the times hereinafter mentioned the Wyoming and Dakota Water Company was, ever since has been, and still is a corporation duly organized and incorporated under and by the laws of the State of California, having a capital stock of the par value of five million dollars, divided into one hundred thousand shares of the par value of fifty dollars each.

That on or about the first day of February, 1881, said corporation, for value received, made and delivered to this plaintiff its certain promissory note in words and figures following, to wit:

"$109,049.76. SAN FRANCISCO, *February 1st*, 1881.

For value received, ten days after date, without grace, the Wyoming and Dakota Water Company promises to pay A. Borland or order the sum of one hundred and nine thousand and forty-nine & $\frac{76}{100}$ dollars, with interest thereon, from date until paid, at the rate of ten (10) per cent. per annum.

(Signed) WYOMING & DAKOTA WATER COMPANY,

[CORPORATE SEAL.] By THOMAS BARR, *President.*
THEO. WIDMANN, *Secretary.*"

That plaintiff thereafter duly endorsed and transferred said note to one Samuel McMaster.

That said corporation did not pay said note or any part thereof at maturity, and thereupon said Samuel McMaster duly instituted an action against said corporation to recover the same in the district court in and for Lawrence county, in the first judicial district,
2 in the Territory of Dakota, in which said county and Territory said corporation then had its works and carried on business, and which said court then and there had full jurisdiction of the subject-matter of said action and of the parties thereto; that such proceedings were duly taken and had in said action that said McMasters thereafter, on the 23rd day of April, 1881, recovered judgment, duly given by said court, against said corporation for the sum of one hundred eleven thousand five hundred six and $\frac{76}{100}$ dol-

lars ($111,506.76), being the amount due on said promissory note, together with interest thereon and costs.

That execution on said judgement was thereafter duly issued against said corporation and returned unsatisfied, except as to the sum of eleven thousand two hundred nineteen $\frac{13}{100}$ dollars ($11,219.13).

That also execution was thereafter duly issued on said judgement against said corporation and returned unsatisfied, except as to the further sum of twenty-seven thousand four hundred fifty-five $\frac{90}{100}$ dollars ($27,455.90), and thereupon there remained and was and still remains and is due and unsatisfied upon said judgement the sum of seventy-two thousand eight hundred and thirty-one $\frac{73}{100}$ dollars ($72,831.73), with interest thereon from the 18th day of August, 1881, the date when said alias execution was returned, as aforesaid, together with interest on the sum of $111,506.76 from the 23rd day of April, 1881, to the 17th day of May, 1881, on which date the first execution was returned, as aforesaid, and with interest on the sum of $100,287.63 from said 17th day of May, 1881, to the 18th day of August, 1881.

Plaintiff is informed and believes and alleges that the above-named defendants are and ever since the 6th day of April, 1879, have been stockholders of said corporation, the Wyoming and Dakota Water Company, holding stock therein to the amount of two hundred fifty thousand dollars ($250,000), being five thousand shares at the par value of fifty dollars each; that said stock stands and has during all said time stood upon the books of said corporation in the name of George D. Haven, trustee, but that said defendants are and during all said time have been the real owners thereof, holding and owning equal one-half parts thereof.

Plaintiff further shows that of the said capital stock of said corporation eight thousand shares were from the time of the or-
3 ganization of said corporation and still are preferred stock and not liable to assessment or to contribuation for the debts of said corporation.

That on and prior to the 20th day of October, 1880, and prior to the making of said promissory note and prior to the recovery of said judgement thereon against said corporation, twelve thousand shares of the capital stock of said corporation had been duly sold under and in accordance with the statute in such case made and provided, for and on account of assessments thereof duly levied and imposed thereon, which assessments had become and remained unpaid and delinquent, which said twelve thousand shares of said stock were purchased for and by and were on said 20th day of October, 1880, and ever since have been and still are held and owned by said corporation.

That at the time said indebtedness of said corporation accrued and at the time said promissory note was made and said judgment rendered the total number of shares of the stock of said corporation issued to and held by stockholders liable to contribute for and on account of the indebtedness of said corporation was, ever since has been, and still is eighty thousand shares and no more.

Plaintiff further shows that the said judgment hereinbefore mentioned has been duly assigned and transferred to and is now held and owned by this plaintiff.

For a further and separate cause of action against said defendants plaintiff further alleges:

That at all the times hereinafter mentioned the Wyoming and Dakota Water Company was, ever since has been, and still is a corporation duly organized and incorporated under and by the laws of the State of California, having a capital stock of the par value of five million dollars, divided into one hundred thousand shares of the par value of fifty dollars each.

That on or about the 21st day of June, 1880, said corporation, for value received, made and delivered to the payees therein its certain promissory note in words and figures following, to wit:

"$45,000. SAN FRANCISCO, *June* 21*st*, 1880.

On the 20th day of August, 1880, at three o'clock p. m. of that day (no grace), for value received, in gold coin of the Govern-
4 ment of the United States, Wyoming & Dakota Water Company promises to pay to the order of A. Borland, A. Hemuse, & R. H. Graves, at the Bank of California, in this city, forty-five thousand dollars, with interest from date, at the rate of five-sixths of one per cent. per month until paid, payable monthly, both principal and interest payable in like gold coin. This note is executed in pursuance of a resolution of the board of directors of said company passed this day.

(Signed) WYOMING & DAKOTA WATER COMP.,
By A. BORLAND, *President.*
THEO. WIDMANN, *Sec'y.*"

That the payees, Borland and Hemme, named in said note, thereafter and before the maturity of said note, duly endorsed the same to said The Bank of California for value.

That when said note became due the same was not paid; whereupon the same was duly protested for non-payment, the expense of which said protest was five dollars.

That thereafter this plaintiff was obliged to and did individually take up said note and pay to said The Bank of California the amount due said bank thereon, and this plaintiff is now the sole owner and holder thereof.

That said corporation, the Wyoming and Dakota Water Company, has never paid any part of said promissory note or of the interest thereon, except the interest thereon to the 31st day of August 1880.

Plaintiff is informed and believes and alleges that the above-named defendants were at the time said promissory note was made and at the time said indebtedness accrued and ever since the 6th day of April, 1879, have been and still are stockholders of said corporation, the Wyoming and Dakota Water Company, holding stock therein to the amount of two hundred fifty thousand dollars

($250,000.00), being five thousand shares of the par value of fifty dollars each.

That said stock stands and has during all said time stood upon the books of said corporation in the name of George D. Haven, trustee, but that said defendants are and during all said time have been the real owners thereof, holding and owning equal one-half parts thereof.

5 Wherefore plaintiff demands judgment against said defendants and each of them for such portions of the indebtedness due and owing to this plaintiff from said corporation, the Wyoming and Dakota Water Company, by reason of the premises aforesaid as the amount of shares of stock of said corporation owned by said defendants or either of them respectively bears to the whole amount of the capital stock of said corporation issued to and held by stockholders of said corporation liable to contribute to and for its debts at the time the said several liabilities and debts of said corporation accrued; that this court ascertain the proportion of said claims and debts for which each of said defendants is liable, and that judgement be entered in favor of this plaintiff against each of said defendants therefor; that plaintiff have such other and further relief in the premises as shall be just and equitable, together with costs.

HOSMER P. McKOON,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Archibald Borland, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon his information or belief, and as to those matters he believes it to be true.

A. BORLAND.

Subscribed and sworn to before me this 15th day of March, 1883.
[SEAL.] EDW'D CHATTIN,
Notary Public.

Endorsed: Filed March 13th, 1883. Wm. T. Sesnon, clerk, by J. D. Ruggles, dep. clerk.

6 *Summons.*

In the Superior Court of the City and County of San Francisco, State of California.

ARCHIBALD BORLAND, Plantiff,
vs.
GEORGE D. HAVEN & D. C. NICHOLS, Defendants.

Action brought in the superior — of the city and county of San Francisco, State of California. and the complaint filed in the office of the clerk of said county.

Hosmer P. McKoon, plaintiff's attorney.

The people of the State of California send greeting to George D. Haven and D. C. Nichols, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the superior court of the city and county of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served elsewhere, within thirty days.

The said action is brought to obtain judgment against said defendants as stockholders of the corporation, the Wyoming and Dakota Water Company, for such portions of the indebtedness due and owing to plaintiff from said corporation, which is more fully set forth in the complaint herein, as the amount of shares of stock of said corporation owned by said defendants or either of them respectively bears to the whole amount of the capital stock of said corporation issued to and held by stockholders thereof liable to contribute to and for its debts at the time the said several liabilities and debts of said corporation set forth in the complaint herein accrued; also that the court ascertain the proportions of said claims and debts in said complaint mentioned for which each of said defendants is liable, and that judgement be entered in favor of plaintiff against each of said defendants therefor; also that plaintiff have such
7 other and further relief in the premises as shall be just and equitable, together with costs; all of which will more fully appear from and by the complaint herein on file.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff — apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the superior court of the city and county of San Francisco, State of California, this 15th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] WILLIAM T. SESNON, *Clerk*,
By J. D. RUGGLES, *Deputy Clerk.*

Endorsed.

OFFICE OF THE SHERIFF OF THE CITY AND
COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 19th day of March, A. D. 1883, and personally served the same, on the 19th day of March, A. D. 1883, upon Geo. D. Havens and D. C. Nichols, being both the defendants named in said summons, by delivering to Geo. D. Havens, said defendant, personally, in the city and county of San Francisco, a copy of said summons and also a true and correct copy of the complaint in the action named in said summons, attached to said copy of summons, and on the said 19th day of March, A. D. 1883, I served D. C. Nichols, one of the therein defendants, by delivering to him a copy of said summons.

Dated at San Francisco this 20th day of March, 1883.

PATRICK CONNOLLY, *Sheriff*,
By HENRY NEART, *Deputy Sheriff*.

Filed March 21st, 1883.

WILLIAM T. SESNON, *Clerk*,
By J. D. RUGGLES, *Deputy Clerk*.

8 *Appearance.*

In the Superior Court of the City and County of San Francisco, State of California, Department No. 4.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN and D. C. NICHOLS, Defendants.

To Hosmer P. McKoon, Esq., attorney for plaintiff:

Please take notice that we have been retained by and do hereby appear as attorneys for the defendants in the above-entitled action, and the clerk of said court is hereby authorized and directed to enter such appearance of record in said suit.

Dated San Francisco, March 27, 1883.

McALLISTER & BERGEN,
Att'ys for said Def'ts.

Endorsed: Service of the within appearance and receipt of a duplicate thereof admitted this 27th day of March, 1883. Hosmer P. McKoon, att'y for pl'ff. Filed Mar. 27, 1883. William T. Sesnon, clerk, by Wm. J. Rightmire, deputy clerk.

9 *Petition for Removal.*

In the Superior Court of the City and County of San Francisco, State of California, Department No. 4.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN and D. C. NICHOLS, Defendants.

To the honorable the superior court of the city and county of San Francisco, State of California, department No. 4:

The petition of George D. Haven and D. C. Nichols respectfully shows:

That your petitioners are the defendants in the above-entitled action, and the same was brought by Archibald Borland, the plaintiff therein, on the 15th day of March, 1883, in the said superior court of the city and county of San Francisco, State of California, department No. 4, and is now pending in said court.

That the amount in dispute in this action, exclusive of costs, exceeds the sum of five hundred dollars.

Your petitioners further show that this action is brought by plaintiff against your petitioners as alleged stockholders in the Wyoming and Dakota Water Company, a corporation duly organized and incorporated under and by the laws of the State of California, to recover judgment against your petitioners and each of them for such portions of the alleged indebtedness due and accruing to the plaintiff in the above-entitled action from said The Wyoming and Dakota Water Company as the amount of shares of said corporation alleged to be owned by your petitioners, or either of them, respectively bears to the whole amount of the capital stock of said corporation liable to contribute to and for its debts at the time the several liabilities and debts of said corporation accrued; that the court ascertain the proportion of said claims and debts for which each of your petitioners is alleged to be liable, and that a judgement be entered in favor of the above-named plaintiff against each of
10 your petitioners therefor, and for such other and further relief in the premises as shall be just and equitable, with costs.

That said plaintiff is and was at the time of bringing this suit a citizen and resident of the State of California.

That your petitioner George D. Haven is and was at the time of bringing this suit a citizen of the State of Iowa, and that your petitioner D. C. Nichols is and was at the time of bringing this suit a citizen of the State of Minnesota.

That your petitioners have before the filing of this petition appeared in said action.

That no term of this court has been held since this action was commenced, and this petition is filed before the term at which this case could be first tried.

That your petitioners desire to remove this suit, before the trial thereof, into the next circuit court of the United States for the district of California, ninth circuit, to be held in said district of California, in pursuance of the provisions of law as contained in the act

of Congress approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes."

That your petitioners have made and filed in this court with this petition a bond in the penal sum of five hundred dollars, with good and sufficient surety, conditioned that your petitioners shall enter in the said circuit court of the United States, to be held in the district of California, on the first day of its next session, a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that said suit was unlawfully or improperly removed thereto, and shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress approved March 3rd, 1875, are required to be done upon a removal of a suit into a circuit court of the United States from a State court; and your petitioners are ready and willing to give such other and further bond and
11 to do all such other acts as may be lawfully required in the premises.

Your petitioners therefore pray that this honorable court will accept the said bond as good and sufficient surity, according to the provisions of said act of Congress, and that this suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

GEO. D. HAVEN.
D. C. NICHOLS.

HALL McALLISTER, *Of Counsel.*
McALLISTER & BERGIN,
Attorneys for Petitioners.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George D. Haven and D. C. Nichols, having been duly sworn, say and each of them says that he is one of the petitioners and defendants in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

GEO. D. HAVEN.
D. C. NICHOLS.

Subscribed and sworn to before me this 27th day of March, A. D. 1883.

[SEAL.] J. H. BLOOD,
Notary Public.

Endorsed: Filed March 27th, 1883. William T. Sesnon, clerk, by Wm. J. Rightmire, deputy clerk.

12 *Bond on Removal.*

In the Superior Court of the City and County of San Francisco, State of California, Department No. 4.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN and D. C. NICHOLS, Defendants.

Know all men by these presents that we, George D. Haven and D. C. Nichols, as principals, and William D. Garland and Leopold P. F. Walker, of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto Archibald Borland in the sum of five hundred dollars, to be paid to the said Archibald Borland; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of March, A. D. 1883.

Whereas the above-entitled action was brought on the 15th day of March, 1883, in the superior court of the city and county of San Francisco, State of California, department No. 4, and the same is now pending in said superior court, by the said Archibald Borland as plaintiff against George D. Haven and D. C. Nichols as defendants, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes;" and whereas said George D. Haven and D. C. Nichols have made and are about to file therewith their petition in said suit in said superior court in and for the city and county of San Francisco, State of California, for the removal of said cause into said circuit court of the United States to be held in and for said district of California, in the ninth circuit:

13 Now, the condition of this obligation is such that if said George D. Haven and D. C. Nichols shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall then appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are requisite to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; otherwise to remain in full force and virtue.

GEO. D. HAVEN. [SEAL.]
D. C. NICHOLS. [SEAL.]
WM. D. GARLAND. [SEAL.]
L. P. F. WALKER. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

William D. Garland and Leopold P. F. Walker, the sureties in the foregoing obligation, being each duly sworn, each for himself, and not one for the other, says that he is a resident of the State of California and a householder therein, and is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

WM. D. GARLAND.
L. P. F. WALKER.

Subscribed and sworn to before me this 27th day of March, A. D. 1883.

[SEAL.] J. H. BLOOD,
Notary Public.

Endorsed: The within bond is hereby approved this — day of March, 1883. Jas. G. Maguire, judge. Filed March 27, 1883. William T. Sesnon, clerk, by Wm. J. Rightmire, deputy clerk.

14 *Order for Removal to Circuit Court.*

Department No. 4.

In the Superior Court, City and County of San Francisco, State of California.

MARCH 27TH, 1883.

Present: Hon. James G. Maguire, judge.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN *et al.*, Defendant.

On motion of Hall McAllister, Esq., attorney for the defendants, it is hereby ordered that this court accepts the sureties offered by the petitioners and accepts the petition and bond on removal of this cause to the United States circuit court in and for the district of California, and that all proceedings in this court in the said cause be, and the same are hereby, stayed.

I hereby certify the foregoing to be a full, true, and correct copy of an order entered on the minutes of said superior court, department No. 4, in the above-entitled cause.

Attest my hand and the seal of said superior court this 29th day of March, 1883.

[SEAL.] WM. T. SESNON, *Clerk,*
By JOS. B. COOK,
Deputy Clerk.

15 *Clerk's Certificate to Transferred Record.*

In the Superior Court of the City and County of San Francisco, State of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN *et al.*, Defendants. } 9076. 4.

I, William T. Sesnon, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court thereof, do hereby certify that the foregoing constitutes a full, true, and correct copy of the entire record and proceedings in the above-entitled action as the same appears to us of record.

Attest my hand and seal of said superior court this 29th day of March, 1883.

[SEAL.] WILLIAM T. SESNON, *Clerk*,
By A. J. RAISCH, *Deputy Clerk*.

Endorsed: Filed July 9th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

16 *Demurrer to Complaint.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN *et al.*, Defendants. }

Defendants in the above-entitled cause, jointly and severally demurring to the first supposed cause of action in said complaint alleged, assign and specify as grounds of demurrer:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said first count of said complaint is ambiguous, uncertain, and unintelligable, in this, that it does not therefrom distinctly appear whether the defendant is sued upon his liability as a stockholder of the corporation in said complaint named or upon the promissory note of said corporation and the judgement thereon recovered, as in said complaint alleged.

3. That said first count of said complaint is ambiguous, uncertain, and unintelligible, in this, that it does not state or specify when the corporation in said complaint named was incorporated or under what laws the same was incorporated, and said complaint does not state the facts from which to determine the proportion of all the debts and liabilities of said corporation contracted or incurred during the time the defendants herein were or either of them was a stockholder of said corporation.

And defendants jointly and severally further demur to the second count or supposed cause of action in said complaint alleged, and for grounds of demurrer assign and specify as follows:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said second count of said complaint is ambiguous,
17 uncertain, and unintelligible, in this, that it does not therefrom distinctly appear whether defendant is sued upon his liability as a stockholder of the corporation in said complaint named or upon the promissory note of said corporation and the judgment thereon recovered, as in said complaint alleged.

3. That said second count of said complaint is ambiguous, uncertain, and unintelligible, in this, that it does not state or specify when the corporation in said complaint named was incorporated or under what laws the same was incorporated, and said complaint does not state the facts from which to determine the proportion of all the debts and liabilities of said corporation contracted or incurred during the time the defendants herein were or either of them was a stockholder of said corporation.

McALLISTER & BERGIN,
Attorneys for Defendants.

I hereby certify that, in my judgment, the foregoing is well founded in law.

T. I. BERGIN,
Counsel for Defendants.

Endorsed: Due service of within demurrer and receipt of a copy thereof admitted this 15th day of February, A. D. 1884. McKoon & Towle, att'ys for pl'ff.

18 *Affidavit of Geo. D. Haven on Filing Dem'r.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN *et al.*, Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

George D. Haven, being first duly sworn, says: I am one of the defendants in the above-entitled action. The demurrer interposed by defendants in the above-entitled action has not been interposed for the purpose of delay, but affiant has been advised by his counsel and verily believes that said demurrer is well founded in law and meritorious.

GEO. D. HAVEN.

Subscribed and sworn to before me this 15th day of February, A. D. 1884.

J. H. BLOOD,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

Endorsed: Filed February 15, 1884. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

19 At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 15th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

A. BORLAND
vs.
G. D. HAVEN *et al.* } No. 3088.

Copy of Order on Hearing upon Demurrer, &c.

This cause came on regularly this day to be heard upon the demurrer herein—T. I. Bergin, Esq., appearing for said demurrer and the defendants and G. W. Towle, Esq., in support of the bill of complaint—and was argued by the respective counsel. On motion of G. W. Towle, Esq., it is ordered that complainant have ten days within which to amend his bill.

20 *Amended Complaint.*

In the Circuit Court of the United States for the Ninth Circuit, District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN and D. C. NICHOLS, Defendants.

Now comes the plaintiff, Archibald Borland, by Hosmer P. McKoon, his attorney, and, by leave of the court first had and obtained, files this his amended complaint and complains of George D. Haven and D. C. Nichols, the defendants, and alleges—

That at all the times hereinafter mentioned the Wyoming and Dakota Water Company was, ever since have been, and now is a corporation duly organized and incorporated under and by virtue of the laws of the State of California, having a capital stock of the par value of five million dollars, divided into one hundred thousand shares of the par value of fifty dollars each.

That said corporation was so duly incorporated on or about the 26th day of January, 1878.

That the principal place of business of said corporation has at all times been and now is the city and county of San Francisco, State of California, and in said city and county the directors of said corporation, duly elected, have always heretofore met and transacted the business of said corporation.

That heretofore, to wit, on the first day of February, 1881, said corporation became and was indebted to plaintiff for moneys of plaintiff had and received by and for the use and benefit of said corporation from plaintiff in the full sum of $109,049.76, and on said day said corporation promised and agreed with plaintiff to pay

to plaintiff interest on said indebtedness, to wit, said sum of
21 $109,049.76, so had and received, at the rate of ten per cent. per annum, from said 1st day of February, 1881, until said debt should be paid and discharged.

That heretofore, to wit, on the 17th day of May, 1881, the sum of $11,219.13 was paid and applied toward the payment of said indebtedness and the interest then due thereon, and on the 18th day of August, 1881, the further sum of $27,455.90 was paid and applied toward the payment of said indebtedness and the interest then due thereon.

That save and excepting said several sums so paid and applied as aforesaid, said debt due from the Wyoming and Dakota Water Company to plaintiff as aforesaid and the interest due thereon as aforesaid is and are wholly unsatisfied and unpaid, and there is now due and owing to this plaintiff from said corporation for and on account of said indebtedness as aforesaid the sum of $76,195.98, together with interest on said sum, at the rate of ten (10) per cent. per annum, from the said 18th day of August, 1881.

Plaintiff upon his information and belief alleges that on said 1st day of February, 1881, and from a date long prior thereto, to wit, from the 6th day of April, 1879, continuously to said 1st day of February, 1881, and prior to, at, and during the time said corporation became indebted to plaintiff as aforesaid defendants were and ever since have been stockholders in said corporation, the Wyoming and Dakota Water Company, holding stock therein during all of said times to the amount of $250,000, being five thousand shares of the par value of fifty dollars each; that said stock stands and during all of said times has stood upon the books of said corporation in the name of George D. Haven, trustee, but that said defendants are and during all of said times have been the real owners thereof, holding and owning equal one-half parts thereof, and, as such stockholders, are liable to contribute for the debts of said corporation.

That at the time said indebtedness of said corporation to the plaintiff was incurred as aforesaid the total number of shares of the stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of the debts of said corporation was eighty thousand shares and no more.

22 For a further and separate cause of action against said defendants plaintiff further alleges:

That at all the times hereinafter mentioned the Wyoming and Dakota Water Company was, ever since has been, and now is a corporation duly organized and incorporated under and by virtue of the laws of the State of California, having a capital stock of the par value of five million dollars, divided into one hundred thousand shares of the par value of fifty dollars each.

That said corporation was so duly incorporated on or about the 26th day of January, 1878.

That the principal place of business of said corporation has at all times been and now is the city and county of San Francisco, State of California, and in said city and county the directors of said cor-

poration, duly elected, have always heretofore met and transacted the business of said corporation.

That heretofore, to wit, on or about the 21st day of June, 1880, said corporation became and was indebted to plaintiff for moneys of plaintiff had and received by and for the use and benefit of said corporation from plaintiff in the full sum of forty-five thousand dollars ($45,000), and on said day said corporation promised to pay to plaintiff interest on said indebtedness, to wit, said sum of $45,000 so had and received at the rate of five-sixths (⅚) of one (1) per cent. per month, from said 21st day of June, 1880, until said debt should be paid and discharged.

That no part of said indebtedness of said corporation to this plaintiff in said sum of $45,000 has ever been paid or discharged, but instead thereof the whole of said sum is now due and payable to plaintiff.

That no part of said interest upon said indebtedness has ever been paid or discharged, save and excepting the interest on said sum to the 31st day of August, 1880, but instead thereof interest on said indebtedness, to wit, said sum of $45,000, from the said 31st day of August, 1880, at the rate aforesaid, is now due and payable to plaintiff.

Plaintiff upon his information and belief alleges that on said 21st day of June, 1880, and from a date long prior thereto, to wit, from the 6th day of April, 1879, continuously to said 21st day
23 of June, 1880, and prior to, at, and during the time said corporation became indebted to plaintiff as aforesaid, defendants were and ever since have been stockholders in said corporation, the Wyoming and Dakota Water Company, holding stock therein during all of said time to the amount of $250,000, being five thousand (5,000) shares of the par value of fifty dollars each; that said stock so held stands and during all of said times has stood upon the books of said corporation in the name of George D. Haven, trustee, but that said defendants are and during all of said times have been the real owners thereof, holding and owning equal one-half parts thereof, and as such stockholders are liable to contribute for the debts of said corporation.

That at the time said indebtedness of said corporation to this plaintiff was incurred as aforesaid the total number of the shares of the stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of its debts and liabilities was 80,000 shares and no more.

Wherefore plaintiff demands judgment against said defendants and each of them for such portions of the indebtedness due and owing to this plaintiff from said corporation, the Wyoming and Dakota Water Company, by reason of the premises in the said several causes of action stated as aforesaid as the amount of shares of stock of said corporation owned by said defenda-ts or either of them respectively bears to the whole amount of the capital stock of said corporation liable to contribute — and for its debts and liabilities at the times the said several liabilities and debts of said corporation were incurred; that this court ascertain the proportions of said in-

debtedness for which each of said defendants is liable, and that judgement be entered herein in favor of this plaintiff against each of said defendants therefor; that plaintiff have such other and further relief in the premises as shall be just, together with his costs herein incurred.

HOSMER P. McKOON,
Att'y for Pl'ff.

24 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. Borland, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

A. BORLAND.

Subscribed and sworn to before me this 22nd day of September, 1884.

[SEAL.] GEO. T. KNOX,
Notary Public.

Endorsed: Service of the within amended complaint and receipt of a copy admitted this 24th day of Sept., 1884. McAllister & Bergin, att'ys for def'ts. Filed Sept. 25, 1884. L. S. B. Sawyer, clerk, by F. D. Monckton, dep. clerk.

25 *Demurrer to Amended Complaint.*

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D. HAVEN *et al.*, Defendants.

The defendants in the above-entitled action demur to the amended complaint of the plaintiff, and for ground of demurrer assign and specify as follows, viz:

1. Said complaint does not state facts sufficient to constitute a cause of action.

2. The first count of said complaint does not state facts sufficient to constitute a cause of action.

3. The first count of said complaint is ambiguous, uncertain, and unintelligible, in this, that the same does not state when, where, or in what manner the corporation therein named had or received the amount of money therein alleged or any part of the same to or for the use of plaintiff, or whether said corporation had or received all of said money at once or at different times, or whether said moneys were had and received or had or received to or for the use and benefit of plaintiff or for the use and benefit of said corporation, or

what the number of shares of the capital stock of said corporation was, and averment of the alleged number of shares of the stock of said corporation liable to contribute to the payment of the alleged indebtedness of plaintiff is merely an averment of a conclusion of law without statements of any facts warranting the same; and the said count does not state what the indebtedness of said corporation was, when said corporation had and received the moneys of plaintiff or any part of the same, or when the indebtedness sued on accrued, or state any facts to enable the court to determine the extent of the liability of defendants or of either of them, nor does said count state how or when said corporation became indebted to plaintiff in the sum alleged or in any sum of money or any con-
26 sideration for said alleged promise of said corporation.

And said count does not state facts sufficient to constitute a cause of action, in this, that a stockholder is individually liable for his proportion of the debts and liabilities of the corporation contracted or incurred while such stockholders in a corporation, and is then liable only upon and in respect of his proportionate share of such original indebtedness, and in order to show such liability said count should allege when, where, and how said corporation received each particular sum of money, and a statement in gross of the same is insufficient; and the stockholders cannot be made individually liable upon or in respect of any supposed promise made by said corporation in consideration of alleged receipt by it of moneys to or for the use or benefit of plaintiff or of said corporation; that while the corporation itself may be liable upon such a promise, the stockholder is not legally liable therein.

4. The second count of said complaint does not state facts sufficient to constitute a cause of action.

5. The second count of said complaint is ambiguous, uncertain, and unintelligible, in this, that the same does not state when, where, or in what manner the corporation therein named had or received the amount of money therein alleged or any part of the same to or for the use of the plaintiff, or whether said corporation had or received all of said money at once or at different times, or whether said moneys were had and received or had or received to or for the use and benefit of plaintiff or for the use and benefit of said corporation, or what the number of shares of the capital stock of said corporation was, and averment of the alleged number of shares of the stock of said corporation liable to contribute to the payment of the alleged indebtedness of plaintiff is merely an averment of a conclusion of law without statement of any facts warranting the same; and the said count does not state what the indebtedness of said corporation was, when said corporation had and received the moneys of plaintiff or any part of the same, or when the indebtedness sued on accrued, or state any facts to enable the court to determine the extent of the liability of defendants or of either of them, nor does said count state how or when said corporation became indebted to plaintiff in the sum alleged or in any sum of money
27 or any consideration for said alleged promise of said corporation.

And said count does not state facts sufficient to constitute a cause of action, in this, that a stockholder is individually liable for his proportion of the debts and liabilities of the corporation contracted or incurred while such stockholder in a corporation and is then liable only upon and in respect of his proportionate share of such original indebtedness, and in order to show such liability said count should allege when, where, and how said corporation received each particular sum of money, and a statement in gross of the same is insufficient and the stockholder cannot be made individually liable upon or in respect of any supposed promise made by said corporation in consideration of alleged receipt by it of moneys to or for the use or benefit of plaintiff or of said corporation; that while the corporation itself may be liable upon such a promise, the stockholder is not legally liable thereon.

McALLISTER & BERGIN,
Attorneys for Defendants.

I hereby certify that, in my judgment, the foregoing demurrer is well founded in law.

T. I. BERGIN,
Counsel for Defendant-.

Endo-sed: Service of within demurrer and receipt of a copy thereof admitted this 10th day of January, A. D. 1885. H. P. McKoon, att'y for plaintiff. Filed January 10, 1885. L. S. B. Sawyer, clerk.

28 At a stated term, to wit, the February term, A. D. 1887, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 7th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Lorenzo Sawyer, circuit judge.

A. BORLAND
vs.
G. D. HAVEN *et al.* } No. 3088.

Copy of Order Overruling Demurrer.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer to the amended bill of complaint herein, having been duly considered, it is ordered that the said demurrer be, and the same hereby is, overruled.

29 *Answer.*

In the Circuit Court of the United States for the Ninth Circuit, District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEORGE D HAVEN *et al.*, Defendants. }

The defendants in the above-entitled action, for joint and several answer to the amended complaint of the plaintiff therein, deny, and

each of them denies, upon information and belief that the Wyoming & Dakota Water Company in said complaint named, on February 1st, 1881, or at any time, was indebted to plaintiff for moneys of plaintiff had and received by or for the use and benefit of plaintiff or otherwise or at all in the sum of $109,049.76, or in any sum of money.

And deny and each of them denies that on said date or at any time or at all said corporation promised and agreed to pay plaintiff interest on said sum or on any part thereof or at all at the rate of ten per cent. per annum or at any rate from the 1st day of February, 1881, until said supposed debt should be paid and discharged or otherwise or in anywise or at all.

Upon information and belief deny and each of them denies that on May 17th, 1881, the sum of $11,219.13 or any sum was paid and applied or paid or applied towards the payment of said supposed indebtedness and the interest then due thereon or otherwise, or that on the 18th day of August, 1881, or at any time the further sum of $27,455.90 or any sum was paid and applied or paid or applied towards the payment of said supposed indebtedness or any part thereof or any interest then due thereon or at all.

Upon information and belief deny and each of them denies that, save and excepting said supposed sums in said complaint alleged to have been paid and applied or paid or applied as therein alleged, the supposed debt therein alleged to be due from the Wyoming & Dakota Water Company to plaintiff or any part of same or any interest on same or any part of same is wholly due and unsatisfied or unpaid, or that there is now due and owing or due or owing from said corporation to plaintiff for and on account or for or on account of said supposed indebtedness the sum of $76,195.98 or any part thereof, with interest on said sum at the rate in this behalf alleged or at any rate or at all from the 18th day of August, 1881, or from any time or at all.

Admit that these defendants severally and separately, but not jointly, from the 27th of May, 1879—said Nichols up to June of 1880, and said Havens up to November of 1880—each owned 2,500 shares of the capital stock of said corporation.

Deny and each of them denies that they or either of them so owned said stock or any part of same prior to or at or during the time said corporation became indebted to plaintiff, as in this behalf alleged, and deny, upon and according to their information and belief, that said corporation at any of the times in this behalf in the complaint alleged became indebted to plaintiff as in said complaint alleged or otherwise or at all.

And these defendants aver that they have not information or belief sufficient to enable them to answer that part of said complaint in the words following, to wit: That at the time said indebtedness of said corporation to this plaintiff was incurred as aforesaid the total number of shares of the stock of said corporation issued to and held by the stockholders of said corporation liable to contribute for and on account of the debts of said corporation was 80,000 shares

and no more, and upon the ground and for that reason these defendants and each of them deny the same and every part of same.

And, answering unto the second supposed cause of action in said complaint alleged, these defendants deny and each of them denies that on or about June 21st, 1880, or at any time or at all said corporation became or was indebted to plaintiff in the sum of $45,000.00 or in any sum of money for moneys paid out and received by said corporation or otherwise or at all for the use and benefit or for the use or benefit of said corporation or otherwise or at all, or that said corporation on the date alleged or at any time or at all promised to pay plaintiff interest on said supposed indebtedness or on any part of same or on said sum of $45,000.00 or on any sum of money interest at the rate of five-sixths of one per cent. per month or at any rate from the 21st of June, 1880, until said supposed debt should be paid or discharged or until any other time.

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And upon information and belief these defendants and each of them deny that said supposed indebtedness or any part of said supposed indebtedness of $45,000.00 has never been paid or discharged or that the whole or any part of same is now due and owing or due or owing or due and payable to plaintiff.

And upon information and belief defendants and each of them deny that no part of said supposed interest upon said supposed indebtedness has ever been paid or discharged save and except or save or except the interest on said sum to the 31st of August, 1880, or at any time or at all, or that interest on said supposed indebtedness or any part of same from the 31st of August, 1880, at the rate in this behalf alleged or at any rate or at all is now due and payable or due or payable to plaintiff.

Defendants admit that on and from the 27th of May, 1879, said Nichols thence up to June of 1880 and said Havens up to November of 1880, each, severally and separately, was the owner of 2,500 shares of the capital stock of said corporation, which shares were held and owned by these defendants, not jointly, but separately and severally, each owning for himself the number of shares thereof hereinbefore last stated, and save and except as herein last stated these defendants were not and are not holders of any stock in said corporation.

And upon information and belief these defendants deny and each of them denies that they were or either of them was a stockholder in said corporation prior to, at, or during the time said corporation became indebted to plaintiff as in said complaint alleged, and as to so much of said complaint as — in the words following, to wit, that at the times said indebtedness of said corporation to this plaintiff was incurred as aforesaid the total number of shares of the stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of its debts and liabilities was 80,000 shares and no more, these defendants and each of them aver that they have not sufficient information or belief to enable them to answer, and for that reason deny same and every part of same; and for a further separate and distinct answer and defense these defendants jointly and severally aver that

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said plaintiff ought not to have or maintain the supposed cause and causes of action in said complaint alleged, for that the same did not nor any of the same accrue to plaintiff three years next prior to the commencement of this action, and said supposed causes of action did not nor did any of the same accrue to plaintiff within three years after discovery of the same by plaintiff prior to the commencement of this action.

And these defendants and each of them aver that supposed cause and causes of action in this behalf in said amended complaint alleged are barred by the provisions of section 359 of the code of civil procedure of the State of California.

Wherefore defendants pray to be hence dismissed without day, with their costs.

McALLISTER & BERGIN,
Att'ys for Defendants.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George D. Havens, having been duly sworn, says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

GEO. D. HAVEN.

Subscribed and sworn to before me this 30th day of March, A. D. 1887.

[SEAL.] JAMES MASON,
Notary Public.

Endorsed: Service of within answer and receipt of a copy thereof admitted this 30th day of March, A. D. 1887. H. P. McKoon, att'y for plaintiff. Filed March 30th, 1887. L. S B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

33 *Stipulation that Jury Trial be Waived.*

U. S. Circuit Court of the Northern District of California.

ARCHIBALD BORLAND, Plaintiff, }
vs.
GEORGE D. HAVEN *et al.*, Defendants. }

A jury trial of the above-entitled action is hereby waived.
Jan. 21, 1888.

HOSMER P. McKOON,
Att'y for Pl'ff.
McALLISTER & BERGIN,
Att'ys for Def'ts.

Endorsed: Filed Jan'y 21, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

34 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEO. D. HAVEN and D. C. NICHOLS, Defendants.

The above-entitled cause came on regularly for trial before the court, sitting without a jury, a jury trial thereof having been waived, and Geo. W. Towle, Jr., and John Garber, Esqs., appearing for the plaintiff and T. I. Bergin, Esq., appearing for the defendant. Thereupon testimony and evidence on behalf of the respective parties in support of the issues made by the pleadings herein was introduced and the case was submitted to the court for decision upon briefs in behalf of the respective parties, thereafter to be presented to the court; and now, said briefs having been duly and regularly so presented and said cause submitted, the court, having maturely considered all and singular the facts and the law in the premises and being fully advised thereon, here now makes these its findings of fact and conclusions of law as follows—that is to say:

Findings.

This is a suit brought by plaintiff against defendants to recover the shares for which the defendants are respectively alleged to be personally liable as stockholders of the Wyoming and Dakota Water Company for money advanced by plaintiff to and for the benefit of said corporation.

The answer admits that the defendant Nichols separately, but not jointly with Haven, held 2,500 shares of the stock of said company on May 27, 1879, and from that time till the — day of June, 1880, without specifying the day in June, and that defendant Haven, in severalty and not jointly with Nichols, owned 2,500 shares of said stock from May 27th, 1879, up to November, 1880.

35 From the evidence I find the following additional facts:

The Wyoming and Dakota Water Company is a corporation organized and existing under the laws of the State of California, having its office and principal place for transacting business at San Francisco, in said State, but its field of operation in constructing, purchasing, owning, and maintaining water ditches for supplying towns and cities with pure water for mining and other purposes is in the Territories of Wyoming and Dakota. Its capital stock is $5,000,000, divided into 100,000 shares of $50 each. Of these on May 27, 1879, 5,000 shares were issued and stood upon the books of the corporation in the name of the defendant Haven, trustee, but defendant Nichols owned 2,500 of these shares and defendant Haven 2,500 each in severalty.

Afterwards, on April 6, 1880, this certificate was surrendered and cancelled on the books and the stock reissued in two certificates of 2,500 shares each, in the name of said defendant Haven, trustee,

but the shares so issued were owned respectively by said defendants Haven and Nichols in severalty, each owning 2,500. The said shares were never afterwards transferred on the books of said corporation, but at the time of the commencement of this suit the said stock represented by said two certificates of 2,500 shares each still stood in the name of said Haven, trustee, upon the books of said corporation. In the month of November, 1881, Haven delivered the certificate for 2,500 shares held by himself to one Roberts, with directions to have one hundred shares transferred on the books to one Clay for the purpose of making said Clay, who was an expert in matters of book-keeping, a stockholder and giving him a right as such to examine the books and affairs of said company.

Roberts, for his services in the matter, was to have an interest, but no definite amount was specified. Said Roberts presented said certificate to the secretary of said corporation to thus divide said certificate, and the secretary, having been recently appointed and not being familiar with his duties, made an entry in the books with a view of transferring 100 shares to Clay and leaving the other 2,400 shares still on the books in the name of said Haven and of issuing two certificates in accordance therewith, but there was an unpaid assessment of one dollar per share upon the stock, and under the statute and by-laws of the corporation no transfer could be
36 made on the books of the company while there was an unpaid assessment upon it, and the president called the secretary's attention to the assessment and by-laws, and on that ground declined to sign the transfer or issue the new certificate to Clay and Haven. The incomplete attempted entry and transfer on the books was thereupon cancelled, and the certificate for 2,500 shares returned to the party presenting it for division and transfer as aforesaid, thus leaving the stock standing in the name of Haven upon the books, as when first issued. What became of the certificate afterwards is not shown by the evidence. There was never any other transfer on the books of the company, and no other was ever attempted or demanded. Nichols, some time in 1880, delivered his certificate for 2,500 shares to a Mr. Honore, in New York, with certificates of stock in three other companies, the whole to be sold for $20 per four shares—that is to say, $20 for four shares, embracing one in each company. That is the last known of those shares, so far as the evidence shows. They were never transferred on the books of the corporation or presented for transfer, and the fact of the delivery to Honove, as stated, was not brought in any way to the knowledge of the corporation.

The plaintiff was a large stockholder originally, having 20,000 shares of the stock, and a director in the corporation from its organization until August 12, 1880, and on August 12, 1880, he was president of the board of directors. On said August 12, 1880, he resigned his position, both as president and director, and Jules P. Cavalier was elected director in his place, and Thomas Barr as president of the board. Plaintiff was never afterward a director or officer of said corporation.

On August 12, 1880, several directors resigned and others were

elected in their place. Those elected were elected in plaintiff Borland's interest and through his influence, he having furnished them with the stock necessary to qualify them to be directors.

Prior to the creation of the second and subsequent indebtedness hereinafter set out, to wit, June 30th, 1880, fifteen thousand five hundred and fifty-two shares of the stock of said corporation had been duly sold for unpaid assessments and purchased in at said sale by the corporation, so that there thereafter remained of
37 the stock of said corporation outstanding in the hands of stockholders but 84,448 shares upon which to distribute liability for any indebtedness thereafter accruing. The said corporation had no funds for carrying on its operations other than money raised from assessments on its capital stock.

On June 10, 1880, the superintendent of the Wyoming and Dakota Water Company, at Golden Gate, D. T., drew a draft at three days' sight on the president of said corporation, at San Francisco, in favor of the Merchants' National bank, at Deadwood, for twenty-five thousand dollars, being for alleged indebtedness incurred in the business of the corporation in the construction of its works and for the other purposes of the corporation, &c., in Dakota Territory; which draft was sent by the payee to the Bank of California, at San Francisco, for collection, and was duly presented to the drawee for acceptance and accepted on June 18 and payable on June 21, 1880.

A draft similar in all respects was drawn by said superintendent, at the same place, payable at the same time, in favor of the First National Bank of Dakota, for $20,000, which was sent to Wells, Fargo and Co., in San Francisco, for collection, and which was in like manner on the same day presented for acceptance and accepted, payable on June 21, 1880.

The corporation was without funds to meet these drafts and was compelled to borrow. Upon application made, the Bank ef California agreed to advance the money if plaintiff Borland would indorse the note or guarantee its payment, but not otherwise. Thereupon, on consultation with the directors, plaintiff promised to guarantee the payment upon being paid ten per cent. per annum interest upon the money he should be required to pay upon his guaranty. A meeting of the board of directors was thereupon called to act upon the matter, and met on June 21, 1880. At this meeting a resolution was adopted, in pursuance of the previous understanding between the plaintiff and the directors individually, authorizing the president and secretary to execute a note for forty-five thousand dollars, the amount of the two drafts, payable to the order of A. Borland, A. Hemme, and B. N. Graves, at the Bank of California, reciting that it was "in order to settle the indebtedness of the company to the Bank of California." The note was accordingly executed and the money obtained with which the drafts were paid.

38 This note went to protest, and was afterward paid, with interest, by plaintiff Borland, on August 31, 1880, the amount of interest being $887.50, notarial fees for protest, $5.00.

At the time of this payment plaintiff Borland had ceased to be a director in the corporation.

On or about September 26, 1880, plaintiff Borland paid and took up in like manner on behalf of said corporation a draft of the superintendent of the Wyoming and Dakota Water Company, dated Golden Gate, Dakota Territory, September 10, 1880, in favor of the First National Bank of Deadwood, on the president of said company, at San Francisco, for $6,000, and on or about November 1, 1880, another similar draft, drawn at tne same place, in favor of the same party, dated October 1, 1880, for $3,500. These drafts were drawn for moneys represented by the superintendent and believed to be used in the business and for the purposes of the corporation, and they were afterwards recognized by the board of directors as properly drawn and paid. Plaintiff Borland also paid on behalf of the said corporation to Messrs. Garber and Thornton, for legal services rendered to said corporation, Wyoming and Dakota Water Company, in the latter part of 1879 and first part of 1880, in litigating the right and title of said corporation to the waters of certain streams appropriated to their use, as hereinafter stated, and for other legal services relating to the business of the corporation. The moneys so advanced by plaintiff and paid on behalf of said corporation to Messrs. Garber and Thornton were paid at different times, as their services were rendered, from August or September, 1879, to August, 1880.

The Father de Smet Consolidated Gold Mining Company was a corporation organized and existing under the laws of the State of California, having its principal business office at San Francisco, in the State of California. Its object and its business was to carry on gold mining operations in said Territories of Dakota and Wyoming. It was the first organized of the two corporations herein mentioned and was a successful and dividend-paying corporation.

The plaintiff Borland owned 48,000 of the 100,000 shares of the Father de Smet Company, purchased mostly from the defendants Haven and Nichols. From the organization of the Wyoming and Dakota Company the stockholders were identical or nearly so
39 with those in the Father de Smet Company until the stock in the latter became somewhat scattered. The offices of the two corporations were in the same place in San Francisco, and the same party, Theodore Widman, was secretary for both corporations from the beginning until after the occur-ence of the transactions which constitute the subject-matter of this suit. Plaintiff Borland was a director in the Wyoming and Dakota Company until he resigned, on August 12, 1880, as hereinbefore stated. At the same time he was also a director in the Father de Smet Company till August 12, 1880, when he resigned his position as a director in that company, and another in his interest was elected in his place. On the same day one other director resigned and another was elected in his place through Borland's influence and in his interest, Borland having furnished the stock necessary to qualify both parties so elected to be directors.

Before and on August 20, 1880, defendant Geo. D. Haven was a director in the Wyoming and Dakota Water Company, and he so

continued a director in said company till he resigned said position at a meeting of said board of directors held on November 12, 1880, at which meeting he resigned his position as director and Charles H. Cook was duly elected in his stead. Said defendant Haven was also during the same period and longer a director in the Father de Smet Consolidated Gold Mining Company. The two companies having common stockholders, worked in harmony. The Wyoming and Dakota Water Company was without funds or resources to construct its canals or carry on its business, except such as was derived from assessments upon its stock, and the Father De Smet Company advanced large sums of money from time to time to said company, which were expended in constructing the water ditches or canals and other works of said Wyoming and Dakota Water Company; and when the first two assessments of the stock of the latter company were paid the moneys so paid on assessments were paid over to the Father de Smet Company upon the advances made as aforesaid, but the assessments collected were insufficient to pay all the advances so made from time to time.

Before or about the first of August, 1880, the Father de Smet Company refused to advance any more money, and demanded a repayment of the balance due on prior advancements, which then amounted to about ninety thousand dollars. A plan of settlement was suggested and, in pursuance thereof, at a meeting of the directors of the Wyoming and Dakota Water Company held on August 12, 1880, after the resignation of plaintiff as director as aforesaid, a resolution was unanimously adopted providing for conveyance to the Father de Smet Company all the property of said Dakota Water Company upon the terms that upon the execution of such conveyance the Father de Smet Company should assume and agree to discharge all the liabilities of the said Wyoming and Dakota Water Company, amounting to one hundred and fifty thousand dollars, whether the same should be more or less, and make and deliver to said latter company two negotiable promissory notes of said Father de Smet Company, one payable in ninety days after August 13, 1880, for one hundred thousand dollars, gold coin, and the other for a like amount, payable six months after August 13, 1880, and should further discharge said water company from all claims, demands, and liabilities by reason of any indebtedness arising from advances and payments already made by the Father de Smet Company to or on account of said water company, and authorizing the president and secretary to execute and deliver such conveyance on the performance by the Father de Smet Company of the conditions indicated.

On the same day, August 12, 1880, the directors of the Father de Smet Company met and after the resignation of plaintiff Borland as director and the election of his successor, as hereinbefore stated, said board passed unanimously a resolution, the counterpart of that hereinbefore cited, authorizing the purchase and acceptance of the conveyance of the entire property of the Wyoming and Dakota Water Company and the execution of the notes and discharge of the latter of all its prior liabilities and directing the president and

secretary to receive the conveyance and execute and deliver the proper notes and other acquittances and papers. In pursuance of these resolutions the corporations respectively, by their presidents and secretaries, executed and duly delivered and exchanged the conveyances, notes, release, acquittances, and papers provided for.

On August 20, 1880, the board of directors of the Wyoming and Dakota Water Company held another meeting, at which the
41 defendant Geo. D. Haven, being a director, was present and acted as a director, at which meeting a resolution was, on motion of said defendant Haven, unanimously adopted, which, after reciting that the said purchase and conveyance of the property of the Wyoming and Dakota Water Company and assumption of the debts and discharge of the liabilities for advances to said company by the Father de Smet Company and the execution of the several notes and discharges by the latter corporation to the former, as provided by the resolutions of said corporations respectively passed August 12, 1880, were not satisfactory to the stockholders of the Father de Smet Company, rescinded and annulled the said several resolutions of August 12 and the transactions had in pursuance thereof and placed the said parties *in statu quo*. It authorized the president and secretary to receive a reconveyance of the property before conveyed as aforesaid and upon such receipt to deliver up the notes and other papers received under the arrangement provided for in said prior resolutions.

On the same day, August 20, 1880, the board of directors of the Father de Smet Company met, the defendant Geo. D. Haven being a director and present and acting as one of the said directors, and at said meeting, on motion of Jno. McGillioray, seconded by said defendant Geo. D. Haven, a corresponding resolution was passed rescinding and annulling the said resolutions of August 12 and all action had under them, and on motion of said defendant Haven, a further resolution was unanimously adopted, to the effect that the reconveyances, exchange of documents, rescinding said action, and cancelling the said notes be conducted in accordance with the advice of John Garber, attorney-at-law. In accordance with these resolutions the Father de Smet Company, on the same day, said August 20, 1880, reconveyed to the Wyoming and Dakota Water Company all the said property before conveyed by the latter to the former, and the Wyoming and Dakota Water Company, in consideration thereof and its promise, surrendered to the Father de Smet Company all the notes, releases, acquittances, and papers received from it, and all were cancelled, and the whole transactions were thereby rescinded and annulled and the parties placed *in statu quo*.

42 Afterwards, on November 12, 1880, there was held another meeting of the board of directors of the Wyoming and Dakota Water Company. At said meeting, after receiving and accepting the resignation of defendant Geo. D. Haven and the election of his successor, the said board passed unanimously a resolution that said company execute and deliver to the Father de Smet Company a negotiable promissory note for the sum of $90,787.03, said resolution containing the recitation, "said sum being the amount of the

existing indebtedness due from the Wyoming and Dakota Water Company to the Father de Smet Consolidated Gold Mining Company," said note to be made payable to the said company or order twenty-four days after date, without grace. The president and secretary were thereby duly authorized to execute said note in the name of the corporation, affix the corporate seal thereto, and deliver to said Father de Smet Company. This note was for advances made to the said corporation before the said transactions under the said resolutions of August 12, 1880. In pursuance of this resolution a note was afterwards duly executed in the name of the Wyoming and Dakota Company and delivered to the Father de Smet Consolidated Gold Mining Company; which note is in the words and figures following:

"$90,787.03. SAN FRANCISCO, *Nov.* 18*th*, 1880.

"For value received, twenty-four days after date, without grace, the Wyoming and Dakota Water Company promises to pay to the Father de Smet Consolidated Gold Mining Company or order the sum of ninety thousand seven hundred and eighty-seven and $\frac{3}{100}$ dollars.

"(Signed) WYOMING AND DAKOTA WATER COMPANY,

"[SEAL OF CO.] By THOMAS BARR, *President.*

"THEODORE WIDMAN, *Secretary.*"

At a meeting of the board of directors of the Father de Smet Gold Mining Company, also held on the 12th day of November, 1880, a resolution was unanimously passed authorizing the sale, indorsement, and transfer of said note and any and all right of action arising thereon in favor of said payee to said Borland in consideration of the payment of the amount named in the note by plain-
43 tiff Borland, and in pursuance of said resolution, the said Borland having paid the said sum named therein to the said Father de Smet Company, the said note was duly indorsed, assigned, and delivered to said Borland in pursuance of the provisions of said resolutions. Said Borland paid this money and took the assignment of the note November 15, 1880. Said payment was made by said Borland on behalf of said Wyoming and Dakota Water Company in pursuance of an understanding before that time had with the trustees of said company that he should advance the money for the purpose and receive ten per cent. interest for the money so advanced. Before the payment of said money so advanced, but after the indebtedness had accrued, said Borland had sold to Mr. J. B. Haggin all his interest in both the said Wyoming and Dakota Water Company and the Father de Smet Consolidated Gold Mining Company.

The right to the water of certain streams taken up and appropriated by the Wyoming and Dakota Water Company for the purposes of the corporation, and for the conveyance of which to the place of sale and use it constructed ditches at large expense, was disputed by other parties, and in a suit vigorously litigated to determine the

right and title to those waters a judgement was rendered against the said corporation some time in August, 1880, which greatly reduced the value of the property and rendered the stock nearly or quite worthless.

Had the corporation been successful in this suit and sustained its title to the water it would have possessed one of the most valuable properties in that region of the country. After this judgement no further assessments were paid and no further advances of money made by the Father de Smet Company.

At a meeting of the board of directors of the Wyoming and Dakota Water Company, held at the office of the company on February 1, 1881, a resolution was unanimously and duly passed in the words and figures following, to wit:

"Whereas the Wyoming and Dakota Water Company is indebted to A. Borland as follows, to wit: First, upon a note made by said company to the Father de Smet Consolidated Gold Mining Company, dated November 12, A. D. 1880, payable 24 days after date, for the sum of $90,787.03 (ninety thousand seven hundred and eighty-seven $\frac{3}{100}$ dollars), endorsed by said Father de Smet Gold Mining Company, without recourse, upon which there is this day due, principal and interest, $93,365.77. Second, for moneys heretofore paid by said A. Borland for legal services rendered said company, the further sum of $6,854.16. Third, for the overdrafts of said company upon the Bank of California for the sum of $9,829.83, which said Borland has agreed to pay and this day pays, said three several sums amounting this day to $109,049.76: Now, therefore, resolved, that this day the said Wyoming and Dakota Water Company execute and deliver to said Borland its promissory note, due and payable ten days after date, for the sum of $109,049.76, with interest thereon from date until paid at the rate of ten (10%) per cent. per annum; and the president and secretary of this company are hereby authorized and directed to execute said note in the name of and for and on behalf of this company, and the secretary to affix the official seal of the company thereto."

The said sum of $109,049.76, indebtedness of said corporation to said Borland mentioned in said resolution, is made of the several sums paid and advanced on the drafts for $6,000, the draft of $3,500, the sum of $6,854.16, attorneys' fees paid to Messrs. Garber and Thornton, heretofore mentioned, and the note from the Wyoming and Dakota Water Company to the Father de Smet Consolidated Gold Mining Company for $90,787.03 paid by plaintiff Borland, as hereinbefore in the finding of facts stated, and the interest due on said several sums so paid.

In pursuance of the authority conferred by the foregoing resolution, a negotiable note for the amount specified as being due was duly executed and delivered to plaintiff Borland on said 1st day of February, 1881. The indebtedness from the Wyoming and Dakota Water Company to the Father de Smet Company for moneys advanced as hereinbefore stated, the balance of which is included in this note, arose and accrued while said Borland was a stockholder in said Wyoming and Dakota Water Company. Prior to said

February 1, 1881, and to the said passing of said resolution and making of said note said plaintiff Borland had disposed of all his interest in both corporations to J. B. Haggin.

45 On May 17, 1881, the sum of $11,219.13 was paid and credited on said sum of $109,049.76, due, as aforesaid, on February 1, 1881, and on August 19, 1881, the further sum of $27,455.90 was paid and credited on said sum and duly applied in part payment thereof. No other or further sums have been paid upon the indebtedness hereinbefore set out, and the balance thereof is now due, together with interest on said sum of $45,000 at the rate of $\frac{5}{6}$ of one per cent. per month, and interest on the balance of said second sum of $109,049.76 at the rate of 10 per cent. per annum, said sums now due to said plaintiff from the Wyoming and Dakota Water Company aggregating the sum of two hundred fourteen thousand eight hundred fifty-five and $\frac{46}{100}$ dollars in United States gold coin, on this 31st day of December, 1888.

Said plaintiff Borland, before the maturity thereof, indorsed, transferred, and delivered said note for $109,049.76 to one Samuel McMasters, and the said McMasters, as such indorsee and assignee, on the 17th day of March, 1881, commenced a suit thereon in the district court of Lawrence county, Territory of Dakota, against the said Wyoming and Dakota Water Company, the maker thereof, to recover the amount due on said note, in which suit a judgement was duly entered on April 23, 1881, for the sum of one hundred and eleven thousand five hundred and six and seventy one hundredths dollars. Executions were subsequently issued upon said judgement, and the property of said defendant sold, and the proceeds thereof at said sale applied on said judgment in part satisfaction thereof, the said two several payments of $11,219.13 and $27,455.90 hereinbefore mentioned as credited as payments on said notes being the said net proceeds of the sales of the property of said company hereinbefore set forth.

The said note was held by said McMasters and said suit brought in his name for the use and benefit of said plaintiff Borland, as the real owner thereof, and after said judgement and executions the said judgement and the balance remaining due thereon were duly assigned to said Borland by said McMasters, and at the commencement of this suit said Borland was the real and *bona fide* holder thereof and entitled to the moneys due thereon.

46 During all the times while the transactions here in question were occurring the said Wyoming and Dakota Water Company had superintendents in charge of its works and operations in the said Territories of Wyoming and Dakota, who were duly authorized by resolutions of the board of trustees, duly passed, to act as its agents in the construction of its works and management of its affairs in said Territories, and said agents, in accordance with their prescribed duties, reported monthly to the board of trustees of said corporation at San Francisco the work performed, the character and amount of expenditures on behalf of the corporation, the liabilities incurred, &c., and, as authorized, drew their drafts from time to time on the president of the corporation at San Francisco for moneys

to meet the expenses thus incurred, in the manner hereinbefore indicated with respect to the several drafts in question, and these reports were accepted as correct and acted upon by the board of directors and formed the basis of the entries in the books of the corporation upon this subject, the said directors having made no actual personal inspection and having no actual personal knowledge of the operations of their superintendents, except that on one occasion plaintiff Borland visited the region of the operations of the corporation and made a general extensive inspection of the works, passing over and examining ten or twelve miles on each end of the ditch or canal of the corporation, and the transactions now in question and all other transactions by the board of directors of said corporation respecting the affairs of the corporation in said Territories were based upon the said reports and other information received from their said superintendents and agents and such information as said Borland obtained in his said tour of inspection. It further finds that there was due and owing to plaintiff Borland from said corporation, the Wyoming and Dakota Water Company, upon the indebtedness alleged in the cause of action in the complaint herein first stated, on the 31st day of December, 1888, principal and interest, the sum of one hundred thirty-two thousand three hundred and fifty-one and $\frac{36}{100}$ (132,351.36) dollars in United States gold coin, and that there was due and owing to plaintiff Borland from said corporation on said 31st day of December, 1888, upon the indebtedness alleged in the cause of action second in the complaint herein stated, principal and interest, the sum of eighty-two thousand five hundred four and $\frac{10}{100}$ (82,504.10) dollars in United States gold coin, and that the total indebtedness of said corporation to plaintiff on said 31st
47 day of December, 1888, was and is the sum of two hundred fourteen thousand eight hundred fifty-five and $\frac{46}{100}$ dollars in United States gold coin.

It further finds as facts that at the time the indebtedness first in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of the debts of said corporation and for said indebtedness was eighty-four thousand four hundred forty-eight —, and that at the time the indebtedness second in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders liable to contribute for and on account of the debts of said corporation and for said last-mentioned indebtedness was one hundred thousand shares; and it finds the issues of fact in favor of plaintiff and against defendants severally.

And as conclusions of law it finds that plaintiff is entitled to judgement against defendants severally for their proportional shares of *of* said sum of $214,855.46—that is to say, plaintiff is entitled to judgement against defendant Geo. D. Haven for $\frac{2500}{100000}$ parts of the sum of $82,504.10 upon the second cause of action in the complaint herein stated, and for $\frac{2500}{84448}$ parts of the sum of $132,351.36 upon

the first cause of action in said complaint stated, together amounting to the sum of $5,980.84 in United States gold coin, on the 31st day of December, 1888, and for his costs; and plaintiff is entitled to judgement against defendant D. C. Nichols for $\frac{2500}{100000}$ parts of the sum of $82,504.10 upon the second cause of action in the complaint herein stated, and for $\frac{2500}{844448}$ parts of the sum of $132,351.36 upon the first cause of action in said complaint stated, together amounting, on said 31st day of December, 1888, to the sum of $5,980.84 in U. S. gold coin, and for his costs, each paying one-half the costs.

Let judgement be entered accordingly.

LORENZO SAWYER,
Circuit Judge.

December 31, 1888.

Endorsed: Filed December 31st, 1888. L. S. B. Sawyer, clerk.

48 *Certified Copy of Judgement.*

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEO. D. HAVEN and D. C. NICHOLS, Defendants. } No. 3088.

This cause having come on regularly for trial on the 25th day of January, 1888, being a day in the November, 1887, term of said court, before the court setting without a jury, a trial by jury having been duly waived by written stipulation of counsel for the respective parties, George W. Towle, Jr., and John Garber, Esqs., appearing on behalf of plaintiff and T. I. Bergin, Esq., appearing on behalf of the defendants, and the trial having been proceeded with, on the 26th and 27th days of January, in said year and term, and evidence, oral and documentary, on behalf of the respective parties having been introduced and the evidence being closed, the cause, after arguments of counsel, was submitted to the court for consideration and decision;

And the court, after due deliberation, having filed its findings in writing and ordered that judgement be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reasons of the findings aforesaid, it is considered by the court that Archibald Borland, plaintiff, do have and recover of and from defendant George D. Haven the sum of five thousand nine hundred eighty and $\frac{84}{100}$ dollars ($5,980.84), together with his costs herein expended, taxed against said defendant Haven at $78.95; and it is further considered that said Archibald Borland, plaintiff, do have and recover of and from defendant D. C. Nichols the sum of five thousand nine hundred eighty and $\frac{84}{100}$ dollars ($5,980.84), together with his
49 costs herein expended, taxed against said defendant Nichols at $78.95.

Judgment entered December 31, 1888.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgement entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 31st day of December, A. D. 1888.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed December 31, 1888. L. S. B. Sawyer, clerk.

50 *Clerk's Certificate.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

A. BORLAND
vs.
G. D. HAVEN *et al.* } No. 3088.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgement-roll in the above-entitled action.

Attest my hand and the seal of said court this 31 day of Dec., 1888.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Judgement-roll. Filed Dec'r 31st, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

51 *Opinion.*

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ARCHIBALD BORLAND, Plaintiff,
vs.
GEO. D. HAVEN and D. C. NICHOLS, Defendants. } No. 3088.

(Decided December 17th, 1888.)

1. Civil Code of California.—Section 322 of the Civil Code of California, fixing the liability of stockholders of corporations, adopted in 1876, is not in conflict with article XII, section 3, of the constitution of California of 1879, and was by it expressly continued in force.

2. State statute, remedy given by.—New remedies afforded by State statutes will be applied and new rights given enforced in the national conrts. Held, accordingly, that an action at law to enforce the individual liability of stockholders under provisions of the Civil Code of California may be maintained in the circuit court of the United States.

3. Demurrer, ruling.—Where a demurrer to a complaint is by the court overruled, its efficiency will not, ordinarily, be reconsidered at the trial.

4. Stockholder, suit against; proof of indebtedness of corporation.—In suits to enforce the statutory liabilities of a stockholder for his proportionate share of a debt of the corporation under the Civil Code of California, testimony that in a suit against the corporation to recover such debt would be competent to establish the demand against the corporation is competent to establish the same against the stockholder.

5. Stockholders of record, liability.—Under the Civil Code of California the liability of an owner of stock of a corporation continues until a transfer of the shares once held by him has been entered upon the records of the corporation, and this whether the
52 stock stood on the books of the *the* corporation in the name of such owner or in the name of some other person as trustee without disclosing the name of the true owner.

6. Statute of limitations, when a bar.—The plea of the statute of limitations impliedly admits the existence of the demand, and the burden of proving a bar by the statute is on the party pleading it, as in the case of a plea of payment. Held, accordingly, that where a portion of a demand is claimed to have been barred the party so claiming must prove the specific amount. Mere proof that some portion is barred, not showing the amount, is not sufficient to establish that the bar of the statute applies to any. In the case of a running account, embracing only one entire transaction or liability, the bar only attaches from the date of the last item.

7. Stockholder and director as creditors.—A stockholder, and even a director, may become a creditor of a corporation where the action is not tainted with fraud or other improper act.

8. Bank loan, liability of corporation to director; director as payee on note.—Where a bank advances money to a corporation upon a director's becoming security, and the form of the security is a promissory note of the corporation made payable to the order of one of its directors and endorsed by him to the bank, the transaction is between the corporation and the bank, and not between the corporation and the nominal payee of the note. In such case, when the note goes to protest and is afterward paid by the director, who is the nominal payee and the indorser, a liability accrues against the corporation for the amount paid in favor of the party so paying.

9. Rescinding contract, reinstating liability of stockholder.—When two corporations make a valid agreement whereby an indebtedness of one corporation is extinguished or assumed by the other, it is competent for said corporations, by mutual agreement duly made, to rescind such agreement, reinstate the liability of the corporation so discharged, and place the parties *in statu quo*, and the stockholders of the debtor corporation in such case will become personally liable for their respective proportionate shares of the liabilities so created or reinstated.

53 *Statement of Facts Found by the Court.*

This is a suit brought by plaintiff against defendants to recover the shares for which the defendants are respectively alleged to be personally liable as stockholders of the Wyoming and Dakota Water Company for moneys advanced by plaintiff to and for the benefit of said corporation.

The answer admits the defendant Nichols separately, but not jointly with Haven, held 2,500 shares of the stock of said company on May 27, 1879, and from that time to the — day of June, 1880, without specifying the day in June, and that defendant Haven in severalty, and not jointly with Nichols, owned 2,500 shares of said stock from May 27, 1879, up to November, 1880.

From the evidence the following additional facts are found:

The Wyoming and Dakota Water Company is a corporation organized and existing under the laws of the State of California, having its office and principal place of transacting business at San Francisco, in said State, but its field of operations in constructing, purchasing, owning, and maintaining water ditches for supplying towns and cities with pure water and for mining and other purposes is in the Territories of Wyoming and Dakota. Its capital stock is $5,000,000, divided into 100,000 shares of $50 each. Of these, on May 27, 1879, 5,000 shares were issued and stood upon the books of the corporation in the name of the defendant Haven, trustee, but defendant Nichols owned 2,500 of these shares and defendant Haven 2,500, each in severalty.

Afterwards, on April 6, 1880, this certificate was surrendered and cancelled on the books, and the stock reissued in two certificates of 2,500 shares each in the name of said defendant Haven, trustee, but the shares so issued were owned respectively by said defendants Haven and Nichols in severalty, each owning 2,500. The said shares were never afterwards transferred on the books of said corporation, but at the time of the commencement of this suit the said stock, represented by said two certificates of 2,500 shares each, still stood in the name of said Haven, trustee, upon the books of said corporation. In the month of November, 1881, Haven delivered

54 the certificate for 2,500 shares held by himself to one Roberts, with directions to have one hundred shares transferred on the books to one Clay, for the purpose of making said Clay, who was an expert in matters of book-keeping, a stockholder and giving him a right as such to examine the books and affairs of said company. Roberts for his services in the matter was to have an interest, but no definite amount was specified. Said Roberts presented said certificate to the secretary of said corporation to thus divide said certificate, and said secretary, having been recently appointed and not being familiar with his duties, made an entry in the books with a view of transferring one hundred shares to Clay and leaving the other 2,400 shares still on the books in the name of said Haven, and of issuing two certificates in accord*ing* therewith; but there was an unpaid assessment of one dollar per share upon

the stock, and under the statute and by-laws of the corporation no transfer could be made on the books of the company while there was an unpaid assessment upon it, and the president called the secretary's attention to the assessment and by-laws, and on that ground declined to sign the transfer or issue the new certificates to Clay and Haven. The incomplete attempted entry and transfer on the books was thereupon cancelled and the certificate for 2,500 shares returned to the party presenting it for division and transfer as aforesaid, thus leaving the stock standing in the name of Haven upon the books as when first issued. What became of the certificate afterwards is not shown by the evidence. There never was any other transfer on the books of the company, and no other was ever attempted or demanded. Nichols some time in 1880 delivered his certificate for 2,500 shares to a Mr. Honore, in New York, with certificates of stock in three other companies, the whole to be sold for $20 per four shares—that is to say, $20 for four shares, embracing one in each company. That is the last known of those shares, so far as the evidence shows. They were never transferred on the books of the corporation or presented for transfer, and the fact of the delivery to Honore, as stated, and sale, if sale there was, was not brought in any way to the knowledge of the corporation.

The plaintiff was a large stockholder, originally having 20,000 shares of stock, and a director in the corporation from its organization until August 12, 1880, and on August 12, 1880, he was president of the board of directors. On August 12, 1880, he re-
55 signed his position, both as president and director, and Jules P. Cavillier was elected director in his place and Thomas Barr as president of the board. Plaintiff was never afterwards a director or officer of said corporation.

On said August 12, 1880, several directors resigned and others were elected in their place. Those elected were elected in plaintiff Borland's interest and through his influence, he having furnished them with the stock necessary to qualify them to be directors.

Prior to the creation of the second and subsequent indebtedness, hereinafter set out, to wit, on June 30th, 1880, fifteen thousand five hundred and fifty-two shares of the stock of said corporation were duly sold for unpaid assessments and purchased in at said sale by the corporation, so that there thereafter remained of the stock of said corporation outstanding in the hands of the shareholders but 84,448 shares upon which to distribute the liability for any indebtedness thereafter accruing. The said corporation had no funds for carrying on its operations other than money raised from assessments on its capital stock.

On June 10, 1880, the duly authorized superintendent of the Wyoming & Dakota Water Company, at Golden Gate, D. T., drew a draft at three days' sight on the president of said corporation, at San Francisco, in favor of the Merchants' National bank at Deadwood for twenty-five thousand dollars, being for alleged indebtedness incurred in the business of the corporation in the construction of its works and for the other purposes of the corporation, etc., in Dakota Territory, which draft was sent by the payee to the Bank of

California, at San Francisco, for collection, and was duly presented to the drawee for acceptance and accepted on June 18 and payable on June 21, 1880.

A draft similar in all respects was drawn by said superintendent at the same place, payable at the same time, in favor of the First National Bank of Dakota for $20,000, which was sent to Wells, Fargo & Co., in San Francisco, for collection, and which was in like manner, on the same day, presented for acceptance and accepted, payable on June 21, 1880.

56 The corporation was without funds to meet these drafts, and was compelled to borrow. Upon application made, the Bank of California agreed to advance the money if plaintiff Borland would indorse the note or guarantee its payment, but not otherwise. Thereupon plaintiff promised to guarantee the payment upon being paid ten per cent. per annum interest upon the money he should be required to pay upon his guaranty. A meeting of the board of directors was called to act upon the matter, and met on June 21, 1880. At this meeting a resolution was adopted in pursuance of the previous understanding between the plaintiff and the directors individually, authorizing the president and secretary to execute a note for forty-five thousand dollars, the amount of the two drafts, payable to the order of A. Borland, A. Hemme, and R. N. Graves, at the Bank of California, the resolution reciting that it was "in order to settle the indebtedness of the company to the Bank of California." The note was accordingly executed and the money obtained with which the drafts were paid.

This note went to protest and was afterwards paid, with interest, by plaintiff Borland on August 31, 1880, the amount of interest being $887.50; notarial fees for protest, $5.00. At the time of this payment plaintiff Borland had ceased to be a director in the corporation.

On or about September 26, 1880, plaintiff Borland paid and took up in like manner, on behalf of said corporation, a draft of the superintendent of the Wyoming and Dakota Water Company, dated Golden Gate, Dakota Territory, September 10, 1880, in favor of the First National Bank of Deadwood, on the president of said company, at San Francisco, for $6,000, and on or about November 1, 1880, another similar draft, drawn at the same place, in favor of the same party, dated October 1, 1880, for $3,500. These drafts were

57 drawn for moneys represented by the superintendent and believed to be used in business and for the purposes of the corporation, and they were afterwards recognized by the board of directors as properly drawn and paid. Plaintiff Borland also paid, on behalf of the said corporation, to Messrs. Garber & Thornton, for legal services rendered to said corporation, Wyoming and Dakota Water Company, in the latter part of 1879 and fore part of 1880, in litigating the right and title of said corporation to the waters of certain streams appropriated to their use, as hereinafter stated, and for other legal services relating to the business of the corporation, the sum of $6,854.15. The moneys so advanced by plaintiff and paid on behalf of said corporation to Messrs. Garber & Thornton were

paid at different times, as their services were rendered, from August or September, 1879, to August, 1880.

The Father de Smet Consolidated Gold Mining Company was a corporation organized and existing under the laws of the State of California, having its principal business office in San Francisco, in the State of California. Its object and its business was to carry on gold mining operations in the said Territories of Dakota and Wyoming. It was the first organized of the two corporations herein mentioned and was a successful and dividend-paying corporation.

The plaintiff Borland owned 48,000 of the 100,000 shares of the Father de Smet Company, purchased monthly from the defendants, Haven and Nichols. From the organization of the Wyoming and Dakota Company the stockholders were identical or nearly so with those in the Father de Smet Company until the stock in the latter became somewhat scattered. The offices of the two corporations were in the same place in San Francisco, and the same party,
58 Theodore Widman, was secretary for both corporations from the beginning until after the occurrence of the transactions which constitute the subject-matter of this suit. Plaintiff Borland was a director in the Wyoming and Dakota Company until he resigned, on August 12, 1880, as hereinbefore stated. At the same time he was also a director in the Father de Smet Company till August 12, 1880, when he resigned his position as a director in that company and another in his interest was elected in his place. On the same day one other director resigned and another was elected in his place through Borland's influence and in his interest, Borland having furnished the stock necessary to qualify both parties so elected to be directors.

Before and on August 20, 1880, defendant Geo. D. Haven was a director in the Wyoming and Dakota Water Company, and he so continued a director in said company till he resigned said position at a meeting of said board of directors held on November 12, 1880, at which meeting he resigned his position as director, and Charles H. Cook was duly elected in his stead. Said defendant Haven was also, during the same period and longer, a director in the Father de Smet Consolidated Gold Mining Company. The two companies having common stockholders and a part at least common directors and officers, worked in harmony. The Wyoming and Dakota Water Company was without funds or resources to construct its canals or carry on its business except such as was derived from assessments upon its stock, and the Father de Smet Company advanced large sums of money from time to time to said company, which
59 were expended in constructing the water ditches or canals and other works of said Wyoming and Dakota Water Company, and when the first two assessments of the stock of the latter company were paid, the moneys so paid on assessments were paid over to the Father de Smet Company upon the advances made as aforesaid, but the assessments collected were insufficient to pay all the advances so made from time to time.

Early in the month of August, 1880, or before, the Father de Smet Company refused to advance any more money, and demanded a re-

payment of the balance due on prior advances, which then amounted to about ninety thousand dollars. A plan of settlement was suggested and, in pursuance thereof, at a meeting of the directors of the Wyoming and Dakota Water Company held on August 12, 1880, after the resignation of plaintiff as director as aforesaid, a resolution was unanimously adopted providing for conveying to the Father de Smet Company all the property of said Dakota Water Company upon the terms that upon the execution of such conveyance the Father de Smet Company should assume and agree to discharge all the liabilities of the said Wyoming and Dakota Water Company, amounting to one hundred and fifty thousand dollars, whether the same should be more or less, and make and deliver to said latter company *the* negotiable promissory notes of said Father de Smet Company, one payable in ninety days after August 13, 1880, for one hundred thousand dollars, gold coin, and the other for a like amount, payable six months after August 13, 1880, and
60 should further discharge said water company from all claims, demands, and liabilities by reason of any indebtedness arising from advances and payments already made by the Father de Smet Company to or on account of said water company, and authorizing the president and secretary to execute and deliver such conveyance on the performance by the Father de Smet Company of the conditions indicated.

On the same day, August 12, 1880, the directors of the Father de Smet Company met and after the resignation of plaintiff Borland as director and the election of his successor, as hereinbefore stated, said board passed unanimously a resolution, the counterpart of that hereinbefore cited, authorizing the purchase and acceptance of the conveyance of the entire property of the Wyoming and Dakota Water Company and the execution of the notes and discharge of the latter of all its prior liabilities and directing its president and secretary to receive the conveyance and execute and deliver the proper notes and other acquittances and papers. In pursuance of these resolutions the corporations respectively, by their presidents and secretaries, executed and duly delivered and exchanged the conveyances, notes, release, acquittances, and papers provided for.

Eight days thereafter, on August 20, 1880, the board of directors of the Wyoming and Dakota Water Company held another
61 meeting, at which the defendant Geo. D. Haven, being a director, was present and acted as a director, at which meeting a resolution was, on motion of said defendant Haven, unanimously adopted, which, after reciting that the said purchase and conveyance of the property of the Wyoming and Dakota Water Company and assumption of the debts and discharge of the liabilities for advances to said company by the Father de Smet Company and the execution of the several notes and discharges by the latter corporation to the former, as provided by the said resolutions of said corporations respectively passed August 12, 1880, were not satisfactory to the stockholders of the Father de Smet Company, rescinded and annulled the said several resolutions of August 12 and the transactions had in pursuance thereof and placed the said parties *in statu quo*. It authorized the

president and secretary to receive a reconveyance of the property before conveyed as aforesaid and upon such receipt to deliver up the notes and other papers received under the arrangement provided for in said prior resolutions.

On the same day, August 20, 1880, the board of directors of the Father de Smet Company met, the defendant Geo. D. Haven being a director and present and acting as one of the directors, and at said meeting, on motion of Jno. McGillivray, seconded by said defendant Geo. D. Haven, a corresponding resolution was passed rescinding and annulling the said resolutions of August 12 and all action had under them, and on motion of said defendant Haven, a further resolution was unanimously adopted, to the effect that the reconveyances, exchange of documents, rescinding said action, and cancelling the said notes be conducted in accordance with the advice of John Garber, attorney-at-law. In accordance with these resolutions the Father de Smet Company, on the same day, said August 20, 1880, reconveyed to the Wyoming and Dakota Water Company all the said property before conveyed by the latter to the former, and the Wyoming and Dakota Water Company, in consideration thereof and of its promise, surrendered to the Father de Smet Com-
62 pany all the notes, releases, acquittances, and papers received from it, and all were cancelled, and the whole transactions were thereby rescinded and annulled and the parties by mutual agreement placed *in statu quo*.

Afterwards, on November 12th, 1880, there was held another meeting of the board of directors of the Wyoming and Dakota Water Company. At said meeting, after receiving and accepting the resignation of defendant George D. Haven and the election of his successor, the said board passed unanimously a resolution that said company execute and deliver to the Father de Smet Mining Company a negotiable promissory note for the sum of $90,787.03, said resolution containing the recitation, "said sum being the amount of the existing indebtedness due from the company to the Father de Smet Consolidated Gold Mining Company," said note to be made payable to said company or order twenty-four days after date, without grace. The president and secretary were thereby duly authorized to execute said note in the name of the corporation, affix the corporation seal thereto, and deliver it to said Father de Smet Company. This note was for advances made to the said corporation before the said transactions under the said resolutions of August 12, 1880. In pursuance of this resolution a note was afterwards duly executed in the name of the Wyoming and Dakota Water Company and delivered to the Father de Smet Consolidated Gold Mining Company; which note is in the words and figures following:

"$90,787.03. SAN FRANCISCO, *Nov. 12th*, 1880.

"For value received, twenty-four days after date, without grace, the Wyoming and Dakota Water Company promises to pay
63 to the Father de Smet Consolidated Gold Mining Com-

pany or order the sum of ninety thousand seven hundred and eighty-seven and $\frac{3}{100}$ dollars.

"(Signed) WYOMING AND DAKOTA WATER COMPANY,

"[SEAL OF COMPANY.] By THOMAS BARR, *President.*

"THEODORE WIDMAN, *Secretary.*"

At a meeting of the board of directors of the Father de Smet Gold Mining Company, also held on the 12th day of November, 1880, a resolution was unanimously passed authorizing the sale, indorsement, and transfer of said note and any and all right of action arising thereon in favor of the said payee to said Borland in consideration of the payment of the amount named in the note by plaintiff Borland, and in pursuance of said resolution, the said Borland having paid the said sum named therein to the said Father de Smet Company, the said note was duly endorsed, assigned, and delivered to said Borland in pursuance of the provisions of said resolutions. Said Borland paid this money and took the assignment of the note November 15, 1880. Said payment was made by said Borland on behalf of the said Wyoming and Dakota Water Company in pursuance of an understanding before that time had with the trustees of said company that he should advance the money for the purpose and receive ten per cent. interest for the money so advanced. Before the payment of said money so advanced, but after the indebtedness had accrued, said Borland had sold to Mr. J. B. Haggin all his interest in both the said Wyoming and Dakota Water Company and the Father de Smet Consolidated Gold Mining Company.

The right to the water of certain streams taken up and appropriated by the Wyoming and Dakota Water Company for the
64 purposes of the corporation, and for the conveyance of which to the place of sale and use it constructed ditches at large expense, was disputed by other parties, and in a suit vigorously litigated to determine the right and title to those waters a judgment was rendered against the said corporation some time in August, 1880, which greatly reduced the value of its property and rendered the stock nearly or quite worthless.

Had the corporation been successful in this suit and sustained its title to the water it would have possessed one of the most valuable properties in that region of country. After this judgement no further assessments were paid and no further advances of money made by the Father de Smet Company.

At a meeting of the board of directors of the Wyoming and Dakota Water Company, held at the office of the company on February 1, 1881, a resolution was unanimously and duly passed in the words and figures following, to wit:

"Whereas the Wyoming and Dakota Water Company is indebted to A. Borland as follows, to wit: First, upon a note made by said company to the Father de Smet Consolidated Gold Mining Company, dated November 12th, 1880, payable 24 days after date, for the sum of $90,787.03 (ninety thousand seven hundred

and eighty-seven $\frac{3}{100}$ dollars), endorsed by said Father de Smet Gold Mining Company, without recourse, upon which there is this day due, principal and interest, $92,365.77. Second, for moneys heretofore paid by said A. Borland for legal services rendered said company, the further sum of $6,854.16. Third, for the overdrafts of said company upon the Bank of California for the sum of $9,829.83, which said Borland has agreed to pay and this day pays, said three several sums amounting this day to $109,049.76: Now, therefore,

65 resolved, that this day the said Wyoming and Dakota Water Company execute and deliver to said Borland its promissory note, due and payable ten days after date, for the sum of $109,049.76, with interest thereon from date until paid at the rate of ten (10%) per cent. per annum; and the president and secretary of this company are hereby authorized and directed to execute said note in the name of and for and on behalf of this company, and the secretary to affix the official seal of the company thereto."

The said sum of $109,049.76, indebtedness of said corporation to said Borland mentioned in said resolution, is made up of the several sums paid and advanced on the drafts for $6,000, the draft of $3,500, the sum of $6,854.16, attorneys' fees paid to Messrs. Garber and Thornton, hereinbefore mentioned, and the note from the Wyoming and Dakota Water Company to the Father de Smet Consolidated Gold Mining Company for $90,787.03 paid by plaintiff Borland, as hereinbefore in the finding of facts stated, and the interest due on said several sums so paid.

In pursuance of the authority conferred by the foregoing resolution, a negotiable note for the amount specified as being due was duly executed and delivered to plaintiff Borland on said 1st day of February, 1881. The indebtedness from the Wyoming and Dakota Water Company to the Father de Smet Company for moneys advanced as hereinbefore stated, the balance of which is included in this note, arose and accrued while said Borland was a stockholder in said Wyoming and Dakota Water Company. Prior to said February 1, 1881, and to the passing of said resolution and making of said note said plaintiff Borland had disposed of all his interest in both corporations to J. B. Haggin.

On May 17, 1881, the sum of $11,219.13 was paid and credited on said sum of $109,049.76, due, as aforesaid, on February 1, 1881,

66 and on August 18, 1881, the further sum of $27,455.90 was paid and credited on said sum and duly applied in part payment thereof. No other or further sums have been paid upon the indebtedness hereinbefore set out, and the balance thereof is now due, together with interest on said sum of $45,000 at the rate of $\frac{5}{6}$ of one per cent. per month, and interest on the balance of said second sum of $109,049.76 at the rate of 10 per cent. per annum, said sums now due to said plaintiff from the Wyoming and Dakota Water Company aggregating the sum of two hundred and fourteen thousand eight hundred fifty-five and $\frac{46}{100}$ dollars in United States gold coin, on this 31st day of December, 1888.

Said plaintiff Borland, before the maturity thereof, indorsed, transferred, and delivered said note for $109,049.76 to one Samuel

McMasters, and the said McMasters, as such indorsee and assignee, on the 17th day of March, 1881, commenced a suit thereon in the district court of Lawrence county, Territory of Dakota, against the said Wyoming and Dakota Water Company, the maker thereof, to recover the amount due on said note, in which suit a judgment was duly entered on April 23, 1881, for the sum of one hundred and eleven thousand five hundred and six and seventy one hundredths dollars. Executions were subsequently issued upon said judgment, and the property of said defendant sold, and the net proceeds thereof at said sale applied on said judgment in part satisfaction thereof, the said two several payments of $11,219.13 and $27,455.90 hereinbefore mentioned as credited as payments on said note being the said net proceeds of the sales of the property of said company hereinbefore set forth.

The said note was held by said McMasters and said suit
67 brought in his name for the use and benefit of said plaintiff Borland, as the real owner thereof, and after said judgment and executions the said judgment and balance remaining due thereon were duly assigned to said Borland by said McMasters, and at the commencement of this suit said Borland was the real and *bona fide* holder thereof and entitled to the moneys due thereon.

During all the time while the transactions here in question were occurring the said Wyoming and Dakota Water Company had superintendents in charge of its work and operations in the said Territories of Wyoming and Dakota, who were severally duly authorized by resolutions of the board of trustees, duly passed, to act as its agent in the construction of its works and management of its affairs in said Territories, and said agents, in accordance with their prescribed duties, reported monthly to the board of trustees of said corporation at San Francisco the work performed, the character and amount of expenditures on behalf of the corporation, the liabilities incurred, etc., and, as authorized, drew their drafts from time to time on the president of the corporation at San Francisco for money to meet the expenses thus incurred, in the manner hereinbefore indicated with respect to the several drafts in question, and these reports were accepted as correct and acted upon by the board of directors and formed the basis of entries in the books of said corporation upon this subject, the said directors having made no personal inspection and having no actual personal knowledge of the operations of their superintendents, except that upon one occasion plaintiff Borland visited the region of the operations of the corporation and made a general extensive inspection of the works,
68 passing over and examining ten or twelve miles on each end of the ditch or canal of the corporation, and the transactions now in question and all other transactions by the board of directors of said corporation respecting the affairs of the corporation in said Territories were based upon the said reports and other information received from their said superintendents and agents and such information as said Borland obtained in his said tour of inspection.

There was due and owing to plaintiff Borland from said corporation, the Wyoming and Dakota Water Company, upon the indebtedness

alleged in the cause of action in the complaint herein first stated, on the 31st day of December, 1888, principal and interest, the sum of one hundred and thirty-two thousand three hundred and fifty-one and $\frac{36}{100}$ dollars ($132,351.36) in United States gold coin, and there was due and owing to plaintiff Borland from said corporation on said 31st day of December, 1888, upon the indebtedness alleged in the cause of action second in the complaint herein stated, principal and interest, the sum of eighty-two thousand five hundred four and $\frac{10}{100}$ dollars ($82,504.10) in United States gold coin, and the total indebtedness of said corporation to plaintiff on said 31st day of December, 1888, was and is the sum of two hundred and fourteen thousand eight hundred and fifty-five and forty-six one-hundredths dollars in United States gold coin.

At the time when the indebtedness first in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders of said corporation liable to contribute for and on account of the debts of said
69 corporation and for said indebtedness was eighty-four thousand four hundred and forty-right, and at the time the indebtedness second in said complaint stated was incurred by said corporation, the Wyoming and Dakota Water Company, the total number of shares of the capital stock of said corporation issued to and held by stockholders liable to contribute for and on account of the debts of said corporation and for said last-mentioned indebtedness was one hundred thousand shares.

70 Geo. W. Towle and John Garber, for plaintiff; McAllister & Bergin, for defendant.

SAWYER, circuit judge, after stating the facts as set out:

The principal question presented on the facts as found in this case is whether the defendants, Haven and Nichols, are personally liable to plaintiff respectively for a share of the indebtedness of the Wyoming and Dakota Water Company paid by said plaintiff in the manner stated proportionate to the amount of stock held by them in severalty as compared with the whole amount of stock liable to contribute.

Section 322 of the Civil Code of California, as amended in 1876, provides that "each stockholder of a corporation is individually and personally liable for such portion of its debts and liabilities as the amount of his stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation and for a like portion only of each debt or claim against the corporation. * * * If any stockholder pays his proportion of any debt due from the corporation incurred while he is such stockholder he is relieved from any further personal liability for such debt, and if an action has been brought against him upon any such debt it shall be dismissed as to him upon his paying the costs or such portion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned

by him at the time the debt or liability is incurred, and such liability is not released by any subsequent transfer of stock." C. C., sec. 322.

Thus, taking the several provisions together, a stockholder
71 is personally liable for his proportionate share of each debt of the corporation and of each debt only contracted while he is a stockholder. This section was in force at the time of the adoption of the amended constitution in 1879 and it has never since been changed.

Article XII, section 2, of the constitution of 1879 is as follows: "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law," and section 3 of the same article provides that each stockholder of the corporation * * * "shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was such stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation." Thus the section of the Civil Code, taken together, is precisely like this provision of the constitution: except by express provision no one creditor can collect more than the share of his own particular debt of the stockholders whether he has paid his share of the debts to other creditors or not, but the liability in the aggregate of the stockholders is precisely the same under each since the aggregate of the stockholder's share of liabilities to each creditor is equal to his share of the liabilities upon the whole debt or liabilities of the corporation. It is urged that the constitution on this subject is not self-executing, but that it requires legislation to give it effect; that section 322 of the Civil Code of Procedure is inconsistent with section 3 of article XII of the constitution of 1879, and is therefore, under section 1, article XXII, repealed by it, and, since there has been no other legislation on the subject since the adop-
72 tion of the new constitution to give the constitutional provision effect, that this right of creditors to enforce the personal liability of stockholders has lapsed. Section 1, article XXII, referred to, provides: "That all laws in force at the adoption of this constitution, and not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature." If, therefore, the provisions of section 322 quoted are not inconsistent with the provisions of article XII, section 3, they are, in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The constitution does not provide how the liability shall be enforced—whether against each stockholder separately or all jointly—while the statute goes further and does so provide for its enforcement, and that provision is not inconsistent with the provision of the constitution, but in the end it reaches the same result. Larrabee *v.* Baldwin, 35 Cal., 156, and other cases affirming it establish this point. Were section 322 to be formally re-enacted now by the legislature would anybody pretend that it would be inconsistent

with the constitutional provision now in question in such sense as to render it unconstitutional and void? I apprehend not. If it would not be inconsistent, and therefore unconstitutional and void, if formally re-enacted it cannot be inconsistent, and therefore repealed, now. If it could stand with the constitution upon re-enactment it can stand with it now. Not being inconsistent, as we have seen, it is in express terms continued in force. Section 36 of
73 the old constitution provides that "each stockholder of a corporation shall * * * be individually and personally liable for his proportion of all its debts and liabilities." This, as construed in Larrabee *v.* Baldwin, *supra*, and other cases affirming it, although couched in somewhat different language from that of section 3, article XII, of the new constitution, is in effect identical with the old, except that the new in terms limits the liability of the stockholders to those debts contracted while he is a stockholder and the old does not. Yet, in the case cited and in other cases the courts so construed the old, although there were no such express terms of limitation. Section 322 of the Code of Civil Procedure was certainly not in conflict with section 36 of the old constitution. If its provisions are not in conflict with the old constitution on this point they certainly are not inconsistent with those of the new. They simply provide for carrying the constitutional provisions into effect—for executing them. The defendants are therefore liable personally for their respective shares of the indebtedness unless exonerated or discharged therefrom on some other ground.

It is insisted that the only remedy in this case is, necessarily, in equity, as all the stockholders are interested and personally liable for their respective shares and are necessary parties, and numerous authorities are cited on the point; but the cases cited arose where there was no statute expressly giving a remedy at law. Section 322 of the Code of Civil Procedure of California, still in force, as we have seen, provides: "That any creditor of the corporation may institute joint or several actions against any of its stockholders
74 for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be entered against each in conformity therewith." This is mere procedure in an action at law, especially given by the statute. It is not an equity or an admiralty case, and is general in its application. See section 914, R. S. U. S., applies, or, if it confers a new right and affords a new remedy to enforce it, a right and remedy so afforded will be enforced in a proper case in the national courts. Ellis *v.* Davis, 109 U. S., 500–'3; Fourth National Bank *v.* Franklin, 120 U. S., 747, 756–'8.

The question as to the sufficiency of the amended complaint was disposed of, whether properly or not, on demurrer and the ruling is adhered to.

I have no doubt that the payment of the several sums of money by plaintiff Borland for the benefit of the Wyoming and Dakota Water Company, under the circumstances detailed in the statement of facts, constitute debts or liabilities of the corporation

within the true intent and meaning of the constitution and statutes for which stockholders of corporations are rendered personally liable to the extent of their due proportion. That a stockholder, and even a director, may, in a proper manner, become the creditor of a corporation is settled. Twin Lick Oil Co. *v.* Marbury, 91 U. S., 587; Hotel Co. *vs.* Wade, 97 U. S., 13; Santa Cruz R. R. Co. *v.* Spreckles, 65 Cal., 193; Hallam *v.* Indianola Hotel Co., 56 Iowa, 178. See also Harts *v.* Brown, 77 Ill., 226; Sanborn *v.* Lefferts, 58 N. Y., 179; Brinham *v.* Wellersburg Coal Co., 47 Pa. St., 43–49; Hope *v.* Valley Co., 25 W. Va., 789; Cook, Stock and Stockholders, 660, 663; Duncomb *v.* N. Y., H. & N. R. Co., 88 N. Y., 1 S. C.; 84 *ib.*, 190; Harpending *v.* Munson, 91 *ib.*, 650.

75 The note for $45,000 does not, in my judgment, come within the principle of the decision in Wilbur *v.* Lynde, 49 Cal., 290, and other cases cited by the defendant, conceding, for the purposes of the argument, that they were correctly decided. The transaction was, in fact, between the Wyoming and Dakota Water Company and the Bank of California, and not between the corporation and Borland. The bank declined to advance the money to take up the two drafts on the corporation, one for $25,000 and the other for $20,000, unless Borland would guarantee the payment of the loan, but agreed to advance it upon his guaranty. Now, the form of the note was simply the mode adopted to effect this guaranty. The note was made payable in form to Borland, Hamme, and Graves and endorsed by them and delivered to the Bank of California, this simply being the ordinary form of such transactions with banks. The transaction was between the Bank of California and the corporation, and not between the corporation and the nominal payees of the note. The consideration of the note was advanced by the bank to the corporation on the note and endorsement, and not by or to Borland or on the unendorsed note.

The transaction is substantially, so far as the corporation and Borland are concerned, the same as if the note had been jointly made to the bank as payee by the corporation and Borland as joint makers, instead of its being made payable in form to Borland and endorsed to him by the bank. The money was not advanced on the note, but on the indorsed note. The note went to protest and Borland afterwards paid it, with the interest, on his guaranty, after he ceased to be a director, and the liability of the corporation

76 to him arose from this payment as guarantor, and not upon any advances made to him or by him on the note as payee of the note. I have no doubt that this note, taken in connection with the explanatory oral testimony, and the drafts taken up with the proceeds are entirely competent to show exactly what the transaction in its entirety was. What the effect of the transaction in its entirety upon the rights of the parties was is another question. The facts constituting this entire transaction could only be proved by the kind of testimony introduced—oral testimony—in connection with the notes, and the record evidence of the action of the directors and the facts as set forth in the statement are clearly established by the evidence.

Defendants insist that they were not stockholders at the time the indebtedness in question was incurred, and for that reason that they were not personally liable. Section 324 of the Civil Code of California provides that "shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor or his attorney, or legal representatives, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the numbers or designation of the shares, and the date of the transfer." And the rules and regulations of the company forbade the transfer of the stock on the books of the company while there were any unpaid assessments existing upon it. Under the provisions of the statute cited, so long as a transfer of stock, however absolute in terms, properly remains unrecorded on the books of the corporation, the party in whose name the stock stands, as between himself and the corporation or its creditors, must for all purposes
77 be deemed the owner of the stock.

People *v.* Robinson, 64 Cal., 373; Irons *v.* Manufacturers' National Bank, 27 Fed. Rep., 595; Price *v.* Whitney, 28 Fed. Rep., 297; Evens *v.* Bailey, 66 Cal., 112; see also Cook, Stock and Stockholders, 262; 2 Morawetz, Corporations, 856; Taylor, Corporations, 748; State *v.* Ferris, 42 Conn., 560; Fowler *v.* Ludwig, 34 Me., 455; Skowhegan Bank *v.* Cutler, 49 Me., 315; Dane *v.* Young, 61 Me., 160; Shellington *v.* Howland, 53 N.Y., 371. But in this case a transfer could not be lawfully made upon the books for the reason that there was an unpaid assignment upon the stock of one dollar a share at the time of the alleged assignment of the certificates of stock, and for that reason the then president of the company, Thomas Barr, refused to sign the transfer of the shares held in his own right by Haven, or to permit the entry inadvertently partly made by the secretary to remain on the books, and the incomplete entry was cancelled thereon. But this transfer, such as it was, for the purpose of putting one hundred shares in the name of Clay, was not made till November, 1881. The inchoate transfer on the books is dated November 29, 1881, and Roberts testifies that the certificate was handed to him but a few days before this effort to have a transfer made on the books, and the secretary testifies that it was made very soon after receipt of the certificate. Although Haven has an indefinite idea that he delivered the certificates to Roberts in December, 1880, it is entirely clear from the evidence that this
78 was not done till some time in November, 1881, and the indebtednesses in question all accrued before February 1, 1881, long before the pretended disposition of the stock, and the liability of Haven would not have been affected had the transfer attempted on November 29, 1881, been completed and been valid. There never was any attempt to transfer Nichols' stock upon the books of the corporation, nor was the fact that he had actually assigned his certificate, if he ever did assign it, as to which I have grave doubts, ever been brought to the attention of corporation or its officers.

Both Haven and Nichols, therefore, were stockholders in the cor-

poration when the indebtedness accrued in such sense as to render them personally liable under the constitution and statutes for their due proportion thereof.

It is next contended that *that* the conveyance of the property of the Wyoming and Dakota Water Company to the Father de Smet Company and the release of the former from all indebtedness to the Father de Smet Company by the latter, as set forth in the statement of facts, extinguished all indebtedness for the advances before that time made by the Father de Smet Company, and that the liability could not thereafter be reinstated, as against a stockholder, without his consent, whatever might be the case with reference to the corporation. If it was competent for the Wyoming and Dakota Water Company to convey all its property to the Father de Smet Company, and for the latter, in consideration thereof, to release all prior indebtedness for all advances made and to execute in addition
79 thereto, in favor of the former company, two valid promissory notes for one hundred thousand dollars each, it is not apparent to me why the transaction, by mutual agreement, might not be reversed and the property reconveyed upon a restoration of the consideration received, the liability revived or new liability created, and the parties placed *in statu quo*. The transactions are of precisely the same character, and, if it was competent for the two corporations to make the first transaction, it is not apparent to my mind why they did not have the power to make the second. The property conveyed by the Wyoming and Dakota Water Company was the kind of property which it was organized to obtain, manage, and enjoy; and having conveyed it away, leaving nothing of the kind with which to carry on the business for which it was organized, it was certainly authorized to purchase other property of the kind with the same consideration which it received for the property sold; and if it could legally purchase other property of the kind, why not repurchase, for the same consideration, that before held, sold, and conveyed? There can be no doubt, I think, that it was entirely competent for the Wyoming and Dakota Water Company to repurchase this property from the Father de Smet Company and create a liability for moneys as a part of the consideration and give its note therefor so as to be binding upon the corporation. If so, then the liability thus created against the corporation being valid as against the corporation, it must necessarily be valid against the stockholders of the corporation, for the constitution and statutes expressly make the stockholder personally liable for his
80 "proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder." There can be no such thing as a valid debt or liability against a corporation contracted while a party is a stockholder without that stockholder being at the same time personally liable for his proportionate share.

If therefore it was competent for the corporation to rescind their agreement by a contract valid as to the corporators and place the corporation *in statu quo* or to create a new, but similar, liability that would be binding upon the corporation that act must necessarily be equally binding upon a party who at the time was a stockholder

in the corporation. At the time of these two transactions both defendants were stockholders. The transactions, I have no doubt, were valid and binding upon the two corporations, and that they created corresponding corporate liabilities, and, being so, the stockholders were also liable for their appropriate share; but more than this, these transactions were not without the assent of these defendants. The stock stood in the name of Haven as trustee, but he held the equitable as well as the legal title to 2,500 shares, and the other 2,500 shares he held as trustee for Nichols. He was not only a stockholder, but he was at the time of these transactions a director in both companies. He attended the directors' meeting in person of the Wyoming and Dakota Water Company as director and acted as such, and it was on his motion that the resolution — rescinding the contract between the two corporations, whereby one conveyed its entire property to the other, and in consideration whereof
81 all indebtedness of the party so conveying before executing was released; and this was not all. He also on the same day attended the meeting of the Father de Smet Company, as director, and acted as such, and it was on the motion of another director, seconded by himself, that the corresponding resolution was unanimously passed by that corporation, rescinding the former transaction, so that he directly assented, as a director and stockholder also in both companies, to the contract rescinding the former transaction, reviving the liability of the Wyoming and Dakota Water Company to the Father de Smet Company and placing the parties *in statu quo*. Indeed since the stockholders of the Father de Smet Company were the dissatisfied ones, as shown by the recitals in the resolution, it is not improbable that he was himself one of the parties anxious to rescind. However this may be, it does not now lie in his mouth to say that this liability could not be reinstated in such sense as to bind a stockholder without his assent. He is estopped from setting up such a pretense. I have no doubt, therefore, as to the validity of this proceeding, and that the defendants' personal liability continues.

With reference to the books of the corporation, none were introduced of the character or for the purpose shown in the case of Neilson *v.* Crowford, 52 Cal., 248, cited by defendants. The ledger and day book kept by a clerk were not introduced to show charges against the corporation, nor were they introduced at all. The only books introduced were the record of the stock transfers, to show that defendants' stock had not been transferred on the books, and
82 the records of the proceedings of the board of directors at their various official meetings, to show what the official action of the directors and board was at those meetings. Those records were certainly competent to show what the official action of the board of directors was. Indeed it was the only competent evidence for that purpose. What effect that official section had upon the rights of the parties is quite another question. The directors are certainly the agents of the stockholders elected by them and acting as such under their authority. They are not mere clerks of the corporation, performing ministerial duties only. The records are

open to the inspection of the stockholders, and if the directors representing a majority of the interest of the stockholders abuse their trust; the statute affords a remedy to the minority wronged by their action; but no such abuse has been alleged in the answer or shown by the evidence in this case, and the defendant Haven was a director himself as well as a stockholder.

Nearly, if not all, of the evidence introduced in this case by plaintiff was objected to by defendants and taken under objection and exception, to be considered and ruled upon by the court in the light of all the testimony when the whole case should be before it. One part of the testimony often supplements and throws light upon and illustrates the other. All oral testimony to establish the advance of money by the plaintiff for the benefit of the corporation was objected to because the matters ought to be of record, and the record would be the best evidence; and when record evidence was
83 offered it was objected to because, although it might be competent to establish a liability against the corporation, it is not competent to affect the personal rights of a stockholder of the corporation. Under the principles insisted upon by defendants, I apprehend that it would be very difficult to establish the personal liability of a stockholder to a creditor of the corporation, and that this security or liability provided by the Constitution and statutes would be wholly illusory. In my judgment, it is perfectly competent to show, by the official record of the action of the board of trustees, duly assembled, that, for instance, A B was, by resolution unanimously passed, duly appointed and authorized to act as superintendent of the corporation and general manager of its affairs in Dakota and Wyoming Territory, and by parol evidence that the corporation had property in each of those Territories, and that A B did in fact take the charge and management of its affairs in those regions in pursuance of said appointment; that he in fact made monthly reports of his operations and expenditures in the construction of the ditches and works of the company in those Territories, there being no question as to the specific contents of those reports, and that he drew drafts upon the said corporation at San Francisco for moneys required for his operations; that the directors received and acted upon those reports as correct and in fact paid such drafts, and that it is competent, in corroboration of this oral testimony and to show the dates, amounts, acceptance, etc., to introduce the drafts themselves upon proper proofs of their genui-ness; that it is competent to prove by oral testimony that the corporation had no money with which
84 to take up the drafts as they became due, and it was necessary to borrow money for the purpose; that upon nego-tion with a bank for a loan of money it was ascertained that the money could not be got on the note of the corporation alone, but could be had upon the note of the corporation indorsed or guaranteed by the plaintiff; and this condition of things was brought to the notice of the directors, and this being so shown, that it is competent to show by the records of the board that, at a meeting duly held for the purpose, a resolution was passed authorizing the president to execute a note for the amount of money wanted, to be indorsed by the plain-

tiff as surety, and fixing the rate of interest to be paid on the loan, and then to show by parol testimony, accompanied by the note itself, that the note was in fact executed, indorsed, and delivered in pursuance of said resolution and the money received thereon and the drafts taken up with it; and to further prove that the note so executed, upon which the money was obtained, went to protest, and that it was paid and taken up by the endorser and surety. If this kind of testimony is not competent to prove these facts as against the stockholder, I should like to be informed by counsel how such facts are to be proved in such manner as to fix the liability of a stockholder. Testimony of this kind and similar testimony was introduced—parol testimony, when it was not in writing or of record, and record and written evidence, when there was a record or writing amply sufficient, if admissible for the purpose, to establish all the facts set out in the statement of facts found in this case. The facts undoubtedly exist as stated, and the real
85 question is, What are the legal rights of the parties arising upon the facts?

But because Mr. Borland and the directors were not present in Dakota and did not know from personal observation and knowledge all that was done, and there was no proof by parties having personal knowledge precisely of all the work that was done in Dakota, and whether the money drawn from time to time by the superintendent on the authority of the directors was actually all in fact expended for the purposes set forth in the monthly reports, it is insisted that the action of the board of directors in raising the money and paying the drafts upon the representation of the superintendent and reports upon which the board acted, however valid as against the corporation, is not binding upon a stockholder and can impose no personal liability upon him; that the directors could not create liabilities upon hearsay evidence. The directors of great corporations having business far away from the central office, and often in distant and even in foreign countries, must act upon the reports of their authorized agents. No other mode of conducting their business is practicable or even possible. They cannot possibly have personal knowledge of every act performed in the name of the corporation, and if they cannot render the corporation liable for acts performed beyond the reach of their own observations they cannot carry on the business of the corporation at all. The directors of the Wyoming and Dakota Water Company were certainly authorized to act upon information derived from their authorized agents in the regular course of their business, and in so acting to borrow money for its supposed uses and bind the corporation for its payment, and those who advance it or become responsible to those who do
86 and are thereafter compelled to take up the obligations are not bound to look to the correct application of the money so raised. It was only necessary for plaintiff to show that the directors acted in good faith upon information received from their agents in the usual course of business. It was not necessary to show how all the money was expended, and no effort was made to do so either by hearsay evidence or otherwise.

These transactions are certainly valid as against the corporation, whether the moneys were properly applied by the authorized agent for the corporation in Dakota or not, and in a suit against the corporation by the Bank of California for the moneys advanced or by the sureties on the note to the Bank of California, who were compelled to pay the money to the bank, the evidence in this case would have been admissible.

If on the facts disclosed and proved a valid claim exists against the corporation itself; if the corporation would be liable on the state of facts shown, then of necessity under the constitution and statutes every stockholder at the time the liability accrued must be liable for his appropriate share, as he is liable for his share of all such debts and liabilities of the corporation. There can be no liability of the corporation without a corresponding personal liability of its stockholders under the constitution and laws.

87 If the board of directors could by the facts shown create a liability against the corporation, then the same facts must create a personal liability as to the stockholders, and the objection really goes to the effect of the facts rather than to the kind of proof, and the facts shown are proved by the only kind of testimony by which proof is susceptible. The plaintiff made no effort to prove how or for what particular purposes the funds realized on the drafts of the superintendent were expended, nor was it necessary to make any such proof. There was, then, no hearsay testimony on those points, as there was no testimony at all. The testimony went to the question as to what the directors acted upon, not as to the truth of the reports. It is sufficient that the directors of the corporation acted upon the information received from their superintendent in the ordinary course of business, whether that information was correct or not, and that, being satisfied as to the propriety of their action, they created the liability upon the corporation in the manner set out in the statement of facts. These acts were within the scope of their powers and duties, even if the reports upon which they honestly based their action should turn out to be erroneous, or even in some particulars fraudulent. The question is, what did the directors do upon the information they had from the agents, not whether that information was in all particulars correct or not.

But there is no charge that the moneys raised in the mode stated were not in all respects legitimately expended in the proper business of the company and no occasion for hearsay evidence or other evidence on that point. There is no averment in the answer

88 that there was one dollar improperly raised or improperly expended by the directors, their agents, or anybody else. The answer simply denies that the plaintiff Borland advanced or paid any moneys at all for the benefit of the Wyoming and Dakota Water Company, as alleged in the complaint; and there is not only no averment in the answer, but not a particle of evidence tending in the slightest degree to show that one dollar of the money advanced by Borland on the $45,000 note or the $6,000 and $3,500 drafts or the $6,854.15 paid to Garber and Thornton, or of the money advanced by the Father de Smet Company, the balance of which

was afterwards included in the note set out to the Father de Smet Company, was ever improperly expended or used for any purpose other than the legitimate objects of the corporation; nor is there a particle of testimony tending to show that every dollar claimed was not advanced and paid by plaintiff exactly as is indicated by the testimony on behalf of the plaintiff. The defendants rest alone upon the points that the evidence in-duced by plaintiff is incompetent to establish the facts proved as against the defendants personally, or, being proved, that the facts established do not impose a personal liability upon the defendants, and upon their allegation that they were not stockholders at the time the indebtedness accrued. As to the money paid to Garber and Thornton, they rely upon the additional defense that the action is barred by the statute of limitations. As to the statute of limitations, the first money paid to Garber and Thornton was in August or September, 1879, and the last in August, 1880. The payments were made from time to time, as the services of the litigation proceeded, but the transactions and service were continuous, and may be regarded as one transaction and the payment of items in a running account. The last payments were within the statutory period, so that the
89 bar does not attach to any part. Besides, the defense is an affirmative one, set up by the defendants themselves, and it devolves upon them to show affirmatively that the bar has attached and to what part. Now, it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid. The defense, therefore, on both grounds, must be overruled.

A judgment in favor of McMasters *v.* The Wyoming and Dakota Water Company recovered upon the $109,049.76 note given by the corporation for balance of advances made by the latter to the former and proceedings thereunder was introduced in evidence by plaintiff under objection by defendants that a judgment against a corporation is not competent evidence in an action by a creditor against a stockholder of the corporation to enforce a personal liability. There are some authorities, including some New York cases apparently depending upon peculiar statutes of that State of a highly penal character, that seem at first blush to sustain this view, but I think they are inapplicable. However that may be, the weight of authority appears to be very largely to the effect that a judgment against a corporation for a corporate debt is at least *prima facie*, if not conclusive, evidence against the stockholders therein when sought to be held liable for such debt; and many of the authorities seem to hold it conclusive, except upon proof of fraud or collusion or when there is a defect of jurisdiction. 2 Morawetz, Corporations, 2nd ed., 886; Cook, Stock and Stockholders, sec. 209; Taylor, Corporations, sec. 737; Freeman on Judgments, sec. 177; Don-
90 worth *v.* Colbaugh, 5 Iowa, 300; Grund *v.* Tucker, 5 Kan., 47; Carne *v.* Brigham, 39 Me., 35, 40; Milliken *v.* Whitehouse, 49 *ib.*, 527; Thayer *v.* New England, &c., Co., 108 Mass., 523, 528; Hawes *v.* Anglo-Saxon Co., 101 *ib.*, 385; Bohn *v.* Brown, 33

Mich., 257; Slee *v.* Bloom, 20 John., 669; Schaeffer *v.* Missouri Ins. Co., 46 Mo., 248; Hoagland *v.* Bell, 36 Barb., 57; Hastings *v.* Drew, 76 N. Y., 9–15; Stephens *v.* Fox, 83 *ib.*, 313; Wilson *v.* Pittsburg Co., 43 Pa. St., 421; Merchants' Bank *v.* Chandler, 19 Wis., 457; Glen *v.* Springs, 26 Fed. Rep., 494.

This appears to me to be the better view. At all events, it is not a matter of any consequence in this case, for the liability is fully made out by the oral evidence, various notes, and the record of the action of the boards of directors of the two corporations prior to and independent of this judgment. It might just as well have been omitted. Indeed, it seems to have been introduced merely to complete the history of the transactions under investigation and to show the payments made and credited on the liability alleged in the complaint, which payments and credits were denied in the answer. The payments credited were, in fact, the two sums realized upon the sales of the property upon executions issued upon this judgment, shown by the return of the sheriff upon the executions issued and filed in the case. Indeed, this record seems to be favorable to the defendants rather than against them, as it proves payments of a considerable amount. At all events, the case was fully made out without it, and it can do no harm, even if erroneously admitted.

I am fully satisfied that the plaintiff is entitled to recover.

I cannot go through the long record and rule specifically
91 and independently upon every exception taken to the evidence by the defendants. I have indicated the character of the important evidence and the exceptions thereto and given examples of that upon which I have acted in deciding this case. The other evidence considered is largely of a similar kind and the exceptions of like character. It is necessary to consider one part of the evidence in its relation to others in order to decide intelligently upon its admissibility. Generally, therefore, I overrule the objections taken by defendants.

Should a bill of exceptions be required, it would necessarily include nearly all, if not the whole, evidence in the case, as there is very little that was not taken under objection on some ground on the part of the defendants, and it is necessary to consider one part as illustrated by the others. The facts I have taken pains to set out very fully and at large in the findings, and the question after all is, what is their effect on the rights of the parties? The case can better be disposed of upon the facts than upon rulings upon specific isolated items of evidence. If the acts of the parties, as set out, constitutes a liability against the corporation, then they must create a personal liability upon each stockholder for his proper share. As before stated, there can be no liability on the part of the corporation without creating a corresponding liability for his share against the stockholder. It may well be that a fraudulent and collusive transaction between the party in whose favor the liability is sought to be created and the directors of a corporation intentionally co-operating together could not cast any personal liability upon a stockholder,
but then such a transaction would be equally void as to the cor-
92 poration. I cannot now conceive of a case in which there

is a valid debt or liability against the corporation where there would not, under the constitution and statutes, be a corresponding proportionate personal liability against a party who was a stockholder at the time when the debt or liability was incurred. If this be so, then the only question as to the liability can be, is there a liability against the corporation? And if that be so, then any evidence that is competent to establish the liability as against the corporation must be competent to establish the liability of the stockholders, for the liability of the corporation being established, the liability of the stockholder for his share follows as an inevitable legal consequence by the express terms of the constitution and statutes.

But in this case there is no evidence of any collusion or fraud—nothing to show that the indebtedness in question was not honestly contracted for the legitimate purposes of the corporation, and honestly paid off by the plaintiff Borland, who was, like the defendants, personally liable for his proper share.

It would seem from a consideration of the whole case, upon the evidence before the court, that the stockholders of the two corporations mentioned in the findings acted in concert, proceeding harmoniously and satisfactorily, while the Wyoming and Dakota Water Company had a prospect of acquiring and enjoying a large and valuable property. While the prospects were good, the assessments to meet the expenses of their operations were cheerfully paid by the defendants as well as others; but when the right to the water upon which the value of the investment of the water company
93 wholly depended was adjudged against them, after a vigorours litigation, their hopes were blighed and their investment became nearly worthless. Then the stockholders declined to pay the assessments levied to meet the liabilities of the corporation, and the plaintiff Borland alone, being a large, if not the largest, stockholder, assumed the burden and paid off the existing indebtedness.

If this be so, it is but consistent with justice and common honesty, as well as the requirements of law, that the defendants should be required to refund to him their just share of the amounts so paid.

Let judgment be entered for plaintiff against each defendant for his portion of the amount due, as stated in the findings, with costs.

(Endorsed:) Opinion. Read in open court December 17th, 1888. L. S. B. Sawyer, clerk.

94 *Bond on Writ of Error.*

In the Supreme Court of the United States.

GEORGE D. HAVEN and D. C. NICHOLS, Plaintiffs in Error,
vs.
ARCHIBALD BORLAND, Defendant in Error.

Know all men by these presents that we, George J. Bowron and Daniel B. Milliken, are held and firmly bound unto Archibald Borland, defendant in error herein, in the sum of five hundred dol-

lars ($500), lawful money of the United States of America, to be paid to the said Archibald Borland, his heirs, executors, administrators, successors, or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 7th day of January, A. D. 1890.

Whereas the above-named George D. Haven and D. C. Nichols have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered and entered by the circuit court of the United States of America for the northern district of California in the cause entitled Archibald Borland *vs.* George D. Haven and G. D. Nichols, No. 3088:

Now, therefore, the condition of this obligation is such that if the above-named George D. Haven and D. C. Nichols shall prosecute their said writ of error to effect and shall answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. J. BOWRON. [SEAL.]
DANIEL B. MILLIKEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
L. S. B. SAWYER.

95 UNITED STATES OF AMERICA, } ss:
Northern District of California, }

George J. Bowron and Daniel B. Milliken, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars in lawful money of the United States of America exclusive of property exempt from execution and over and above all debts and liabilities.

GEO. J. BOWRON.
DANIEL B. MILLIKEN.

Subscribed and sworn to before me this 7th day of January, A. D. 1890.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court,
Northern District of California.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed January 7th, 1890. L. S. B. Sawyer, clerk.

96 I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing ninety-five written or printed pages, numbered from 1 to 95, inclusive, are a full, true, and correct copy of the record and of all proceedings in

the therein-entitled action, and that the same together constitute the return to the annexed writ of error.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness my hand and the seal of the said circuit court this seventh day of May, A. D. 1890.

L. S. B. SAWYER, *Clerk.*

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth judicial circuit, northern district of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between George D. Haven, defendant and plaintiff in error, and Archibald Borland, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said defendant and plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of January, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

98 [Endorsed:] R. 3088. United States Supreme Court. Geo. D. Haven, pl'ff in error, *vs.* Archibald Borland, def't in error. Writ of error. Filed January 7th, 1890. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

Received copy of the within writ of error this 7th day of January, A. D. 1890.

GEO. W. TOWLE, JR.,
Att'y for Def't in Error.
HOSMER McKOON,
Original Att'y of Record.

The Answer of the Judges of the Circuit Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States of America within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

99 UNITED STATES OF AMERICA, *ss:*

To Archibald Borland, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1890, pursuant to a writ of error this day duly and regularly issued by the circuit court of the United States of the ninth judicial circuit, northern district of California, and duly allowed by the judge of said circuit court, wherein George C. Haven is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and error in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the ninth judicial circuit, this 7th day of January, A. D. 1890, and of the Independence of the United States the one hundred and fourteenth.

LORENZO SAWYER,
Judge U. S. Circuit Court, Ninth Judicial Circuit.

100 [Endorsed:] R. 3088. In the Supreme Court of the United States. George D. Haven, pl'ff in error, *vs.* Archibald Borland, def't in error. Citation. Filed January 7th, 1890. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

Received copy of within citation this 7th day of January, 1890.

GEORGE W. TOWLE, JR.,
Att'y for Def't in Error.
HOSMER McKOON,
Original Att'y of Record.

Endorsed on cover: Case No. 14,061. N. California C. C. U. S. No. 364. George D. Haven, plaintiff in error, *vs.* Archibald Borland. Filed June 24, 1890.